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FIFTH PUBLIC MEETING  
OF THE  
MULTISTAKEHOLDER FORUM ON  
IMPROVING THE OPERATION OF THE NOTICE AND TAKEDOWN SYSTEM

OCTOBER 28, 2014  
9:06 A.M. TO 11:53 A.M.  
UC BERKELEY SCHOOL OF LAW, BOALT HALL  
BOOTH AUDITORIUM  
215 BANCROFT WAY, BERKELEY, CA 94720

REPORTER'S TRANSCRIPT OF PROCEEDINGS

REPORTED BY ANGELICA R. GUTIERREZ  
CSR #13292

1 MS. PERLMUTTER: So good morning, everyone.  
2 For anyone who hasn't been here at our prior meetings,  
3 I'm Shira Perlmutter, the chief policy officer at the  
4 U.S. Patent and Trademark Office. I wanted to begin by  
5 welcoming all of you here in person and also all of you  
6 attending by webcast to this public meeting of the  
7 multistakeholder forum on the operation of the DMCA  
8 notice and takedown system.

9 This is our fifth public meeting and we have  
10 been alternating between PTO headquarters in Alexandria  
11 and Northern California. And I particularly wanted to  
12 say how grateful we are to Berkeley's law school for  
13 again generously hosting us at our meeting today. This  
14 has been a very fruitful partnership for us over the  
15 course of the year as we work on our various Green  
16 Paper events.

17 So let me just say a few words on the path of  
18 this process and where we are now at the end of  
19 October. So as you all know, the genesis of this  
20 multistakeholder forum was the Green Paper on  
21 copyright, creativity and innovation and digital  
22 economy that the Department of Commerce issued last  
23 year. And we kicked off the forum with an initial  
24 public meeting in March, many of you were there, and  
25 began quite early with a consensus that we should start

1 by focusing on the issue of standardization in the  
2 notice and takedown process.

3 Then at the next meeting in May, the working  
4 group was formed, a smaller, somewhat smaller working  
5 group with a very impressive level of interest and a  
6 very impressive level of participation from all sides.  
7 And that working group has met regularly between  
8 sessions of the full multistakeholder forum. We  
9 understand that the discussions there have continued as  
10 they started being very positive and very productive  
11 and we hear that the participants feel that the  
12 discussions have really increased the level of mutual  
13 understanding of each other's concerns and  
14 perspectives.

15 So the working group has been reporting to the  
16 plenary, to the full forum, at each of our meetings and  
17 this enable us to have complete transparency as this is  
18 webcast and lets the general public follow what's  
19 happening. And, of course, many of you in this room  
20 are participating yourselves in the working group so  
21 you're very involved in its activities.

22 Now, as we understand what's been happening in  
23 the working group, the discussions have gone down a  
24 number of paths and have evolved and at this point  
25 include some issues and approaches other than

1 standardization or going beyond standardization. And  
2 when the co-chairs of the working group Jim Halpert  
3 Sandra Aistars report to us later on, I believe and  
4 hope we will hear that we're making progress, that  
5 agreement is getting closer on at least some elements  
6 and hopefully we'll be able to produce a useful document  
7 of some sort by the end of the year.

8 We are also going to hear at today's meeting  
9 from Brianna Schofield an update on the methodology and  
10 progress of the takedown project that's underway here  
11 at Berkeley. And that will give everyone an  
12 opportunity both to understand what the project is  
13 doing and to have an opportunity to ask any questions  
14 we may have about how that work might inform our  
15 thinking here.

16 And, finally, we will also hear from a panel  
17 discussing their experience with trusted sender  
18 programs for sending notices. So we'll hear a bit  
19 about how these programs have been structured and how  
20 they work and he hope that these insights can take us  
21 forward in thinking about how individuals and small and  
22 medium-sized enterprises might be able to make use of  
23 these types of programs and improve their experience  
24 with the notice and takedown system.

25 And the last item, although not in time on the

1 agenda, we will discuss a little bit about what the  
2 next steps might be, what will happen in December which  
3 will be the last meeting of this calendar year, and  
4 also give some idea, because I've had questions about  
5 this, of exactly how the work of this forum, the  
6 multistakeholder forum, relates to the other work  
7 streams that we're pursuing under the Green Paper and  
8 where we expect to go with each of them.

9               So let me just close with announcing we're  
10 changing the agenda a bit to accommodate people's  
11 travel schedules and so what we will do is start with  
12 Brianna talking about the takedown project and then we  
13 will move to Jim and Sandra's report on where the  
14 working group project stands. And then I will talk a  
15 bit about the next steps and the rest of the Green  
16 Paper work before we turn to the panel as the last item  
17 on the agenda.

18              So thank you very much and I'll now turn it  
19 over to my colleague John Morris from NTIA.

20              MR. MORRIS: Thank you, Shira. I don't really  
21 have much to add other than words of welcome and  
22 appreciation for all the work that has been done and it  
23 does sound like we've made some important progress on  
24 what we -- what the stakeholders have bitten off first  
25 and Shira and all of us are trying to think through and

1 think through with you how best to proceed and move  
2 this whole effort forward into next year. So that's  
3 something that we'll be talking with you about later  
4 today. And so look forward to this session and thank  
5 you very much.

6 MS. PERLMUTTER: Thank you. Do you need us to  
7 move so that the slides are --

8 MS. SCHOFIELD: Thank you. Thanks to the  
9 USPTO and NTIA for bringing this group together, to Jim  
10 and Sandra for their leadership in this process. And I  
11 know that there's been some tireless effort going on in  
12 both the working group and the drafting group. So I  
13 wanted to express my appreciation for that.

14 My name is Brianna Schofield and I'm a  
15 research and policy fellow here at Berkeley law where I  
16 study issues related to intersection of law and  
17 technology. In this role one of my main projects is  
18 studying the notice and takedown system and analyzing  
19 how it's working in practice. So I'm pleased to be  
20 here today to give you an overview of where we're at in  
21 our research.

22 As you all know, Section 512 provides a  
23 collaborative framework. So it provides a framework  
24 for copyright owners to remove infringing content  
25 online and it identifies responsibilities for online

1 service providers and protections for users.  
2 There's -- as you all know, there's some questions  
3 about how this is actually working in practice and how  
4 this balance is playing out and whether it is striking  
5 the right balance currently between copyright  
6 protection and freedom of expression on the internet.

7           Sorry, this is -- so these questions are  
8 central to a lot of discussion about 512 that's going  
9 on now including the discussion that's happening in this  
10 room. But despite these questions, there's very little  
11 empirical evidence out there that is understanding how  
12 notice and takedown is operating in practice. So the  
13 takedown project is undertaking research that aims to  
14 update the -- some of the existing research that's out  
15 there and to provide impartial empirical data to inform  
16 conversations such as the one you're having here.

17           So the takedown project is led by Jennifer  
18 Urban here at UC Berkeley and Joe Karaganis at the  
19 American Assembly at Columbia University. The  
20 foundational work in this area was actually done by  
21 Jennifer Urban. She did a study in 2006 studying  
22 takedown notices submitted to Chilling Effects up through  
23 2006. At that time there were about 900 takedown  
24 notices. So the situation and the landscape has changed  
25 dramatically since then, not least of which of the

1 reasons is because of the number of notices that are  
2 being exchanged at this time. If you're not aware, you  
3 should also look at recent research by Daniel Seng.  
4 Professor Seng did a study that was released last year  
5 that studied takedown notices and the Chilling Effects  
6 database through 2012. At that time there was about a  
7 half a million notices.

8 So the online landscape looks a lot different  
9 than it did back when some of the earlier studies were  
10 done. So we're taking -- we have a two-pronged  
11 approach to our project. The first is an analysis of  
12 machine and hand-coded notices. And the second is an  
13 in-depth survey and interview series with all the  
14 parties involved including online service providers and  
15 rights holders about their internal practices for  
16 handling notices.

17 Before I move on, I do want to note that this  
18 is a part of a broader research network that we've  
19 brought together. We've brought together researchers  
20 from around the world who are looking into notice and  
21 takedown issues. So we did this for a couple of  
22 reasons. The first is that there needs be a worldwide  
23 understanding of takedown, especially as 512 has been  
24 replicated informally and formally around the world to  
25 deal with issues online not limited to copyright,



1 notably notice and takedown is being replicated for  
2 things like privacy issues, informally for trademark  
3 issues and the like.

4           The second reason we felt that there was a  
5 need for a worldwide group is just that the lack of  
6 empirical data is too big of an issue for any one  
7 particular group of researchers to get their heads  
8 around. So we're working collaboratively with these  
9 researchers. We have researchers at the Haifa Center  
10 of Law and Technology in Israel, for example, at the  
11 Institute for Information Law in Amsterdam. Closer to  
12 home folks at Harvard and Stanford are looking into  
13 this and many more.

14           If you are interested in this, I do suggest  
15 that you do take a look at the website  
16 [takedownproject.org](http://takedownproject.org) which is listed on this slide.  
17 You'll see a list of our affiliated researchers, blurbs  
18 about their particular research interest and links to a  
19 lot of articles that have been published in this area.

20           So I've mentioned a couple of times that  
21 there's a lack of research and the lack of empirical  
22 data in this area. So you might reasonably ask why is  
23 this. It's -- there's two main reasons, and the first  
24 is that notice and takedown essentially involves a  
25 series of private communications. So notices and

1 counter-notices are not public documents by default. A  
2 handful of online service providers, as you know, do  
3 contribute their notices to the Chilling Effects  
4 database. But this is an online repository for  
5 takedown notices. But this transparency is not  
6 required and the number of online service providers  
7 that actually contribute their takedown notices are  
8 actually quite few.

9 The second is that notice and takedown  
10 involves non public actions. So the decision making on  
11 all sides is not transparent. As far as I know, no  
12 online service provider publishes detailed information  
13 about the processes that they use for receiving notices  
14 and for analyzing those notices and what resulting  
15 actions that they take. On the same side, rights  
16 holders and rights enforcement services don't publish  
17 detailed information about the information that they  
18 use to detect infringement online and what decisions  
19 that they make when they're sending notices.

20 So because of the lack of transparency in  
21 these two areas, it's actually hard for researchers to  
22 really get below the surface and understand what's  
23 going on. So despite these challenges, we have -- this  
24 is the first part of our project. We have built a  
25 massive database with a large number of notices which

1 we're examining in detail. This is the quantitative  
2 portion of our research. We've built on the works that  
3 Chilling Effects has done. We've ingested six months  
4 of data from the Chilling Effects clearinghouse into  
5 our own database and we're machine and hand coding  
6 these notices.

7           So the profile of the database you can see up  
8 here, six months of data from a chunk of time in 2013.  
9 The largest submitter by far to the Chilling Effects  
10 database is Google, predominantly for Google search  
11 notices, although there are a number of other services  
12 that -- of Google services in the databases including  
13 blogger and image search and others. There's a handful  
14 of other submitters including Twitter and a small group  
15 of other online service providers that report to  
16 Chilling Effects.

17           The six month period of data has about 300,000  
18 notices in it. Those notices, because they may include  
19 more than one request, include about 108 million  
20 targeted items to be taken down. So 108 million what  
21 we call allegedly infringing materials. And those  
22 represent about 11 million unique allegedly infringed  
23 works.

24           So on top of the database we've built a coding  
25 engine to help analyze this data and we've trained a

1 team of research assistants to input information about  
2 these takedown requests. So when a coder logs into the  
3 system, they see this basic interface and the  
4 randomization engine picks one of the allegedly  
5 infringing materials identified in the notice,  
6 typically identified by a URL.

7 The random selection method is actually  
8 different at the URL level rather than the notice level  
9 as a whole. This is a methodology decision that we  
10 made early on because any particular notice might  
11 contain thousands of links. So we're just analyzing  
12 one specific request within that notice. That notice  
13 could then be reselected if another link comes up from  
14 that notice through the randomization engine, there  
15 could be further coding that's done on another alleged  
16 infringement within that notice.

17 So the coder sees this basic format. There's  
18 the coding pane on the left-hand side and on the  
19 right-hand side is the text of the original notice.

20 Okay. So we're focusing in here on the coding  
21 pane. This is where the coder inputs information. So  
22 there's over 700 potential inputs for each coding. So  
23 this includes collecting information in the following  
24 steps. So the first step, the coder is recording  
25 information about the notice as a whole. So this is

1 information about who's sending the notice, who is the  
2 recipient of the notice. It includes information about  
3 asking whether there's -- the notice includes the  
4 statutory required statements, the number of links in  
5 the notice and so on. It also includes information --  
6 sorry the next step is information about the allegedly  
7 infringed work. So this is the underlying copyrighted  
8 work at issue.

9 Here the coder collects information and  
10 records information about what that work is, what  
11 category of work it is, how it's been identified in the  
12 notice. Information about who the copyright owner is  
13 and so on. So then they move on to step three which is  
14 information about the allegedly infringing material.  
15 So this is the targeted material that's being requested  
16 to be removed.

17 So, again, they record information here about  
18 what that is, how it's been identified, how much of the  
19 allegedly infringing work appears to be copied and how  
20 it's being used in that setting.

21 Then they move on and record information about  
22 the site at which the material resides. And finally  
23 they submit the notice and there they are given an  
24 opportunity to sort of free form flag any interesting  
25 issues that have cropped up in that particular coding.

1           So as I said, there's over 700 inputs in the  
2   course of this. That's taking our research assistants  
3   probably on average about 15 minutes to really look in  
4   detail and gather the information that they need for  
5   each particular alleged infringement that they are  
6   looking at. Some of them do take a lot longer and some  
7   of them take a little less time, but on average about  
8   15 minutes.

9           Not all of those 700 inputs are use each time  
10   and some of them are actually auto populated by machine  
11   reading. Some of them require them just to look at the  
12   text of the notice which is in the interface, and some  
13   of them require them to do a little bit of outside  
14   research. For example, clicking on the link and  
15   looking at where the allegedly infringing material is.

16          Okay. So with this, the coding engine is  
17   designed to identify how the system is working. When  
18   we're able to release results of this, this should be  
19   able to give a good idea as to how and under what  
20   conditions takedown notices are being used as intended  
21   and correctly identifying infringing content and  
22   therefore how well the system is working to that aim.

23          It will also identify and quantify potential  
24   deficiencies in the system or in particular notices  
25   such as whether they provide adequate information for

1 an online service provider to identify or to locate the  
2 allegedly infringing material. It will also unearth  
3 claims that do not appear to be copyright claims. So  
4 as I discussed earlier, claims that might be privacy or  
5 trademark claims and the like. And we also have  
6 information that we're collecting in there which will  
7 allow us to surface alleged infringements that appear  
8 to have a strong fair use defense.

9 Okay. So this is the quantitative portion of  
10 our research. Where we're at now is that we've coded  
11 about two and a half thousand of these. We've started  
12 with the main population, everything that's in the  
13 Chilling Effects database. And we now are moving on to  
14 starting to build out separate tranches. So we're  
15 looking at, you know, the main population, as I said  
16 earlier, is largely Google search. So we're looking at  
17 building out separate tranches with different -- seeing  
18 if there's different characteristics for other  
19 tranches.

20 That might be interesting, for example, we're  
21 looking at just Google image search, we're hoping to  
22 build out a tranche that's based on characteristics of  
23 the sender. So perhaps a sender that doesn't send many  
24 notices, perhaps a sender that's only sent one or two  
25 notices within that six-month period, to see if there's

1 anything that is particular to different tranches of  
2 data.

3 So we're also in parallel with the coding now  
4 starting to try to build up a query engine and develop  
5 the questions that we're asking of this data. We are  
6 in the process of doing that now, I hope. I know  
7 everybody is eager for results from this and, believe  
8 me, I am too. We're hoping to have some results in the  
9 next few months.

10 To the extent that there are any online  
11 service providers in the room that don't report to  
12 Chilling Effects but may be willing to speak with me a  
13 little further, perhaps after, contact me later about  
14 sharing takedown notices with this project under these  
15 situations, we'd really love to hear from you, so  
16 please do reach out.

17 Okay. The second part of our research is the  
18 qualitative portion and to notice and takedown  
19 practices. So for this part of our research we have  
20 conducted extensive surveys and interviews of a lot of  
21 parties involved in the system. We have interviewed  
22 online service providers and rights holders and some  
23 trade associations and rights enforcement services. We  
24 have tried to cover a wide range of these, both small  
25 and large and those covering different markets and



1 different types of services offered.

2 We do another ask that I'll make of the room  
3 as we do have a dearth of small senders. So if anybody  
4 in this room would like to reach out to me further  
5 about ideas for approaching folks who maybe don't send  
6 a lot of notices or have a lot of interaction with the  
7 system on a regular basis, I would love to hear from  
8 them.

9 So here again we are working on writing up our  
10 results. I don't have anything that I can  
11 share with you today about what we're finding, but  
12 we're going through, we're analyzing, we're sorting,  
13 we're trying to figure out what we can offer to this  
14 conversation. Again, I hope that there will be  
15 something that we can offer here in the next few  
16 months.

17 Okay. So I will open it up to questions or  
18 comments now and I'm very interested to hear your  
19 feedback and where we might be able to add value to  
20 your conversations or any particular areas of research  
21 that you think would be valuable. And also my e-mail  
22 address is up here. Please feel free to contact me  
23 afterwards and I would be happy to discuss anything  
24 with you further.

25 Thank you.

1 MS. PERLMUTTER: Any questions?

2 MS. AISTARS: It's Sandra Aistars, Copyright  
3 Alliance. I have a question in terms of the types of  
4 analysis that you asked the research assistants to do,  
5 particularly when you're trying to analyze, say, whether  
6 something has a legitimate fair use defense associated  
7 with it, what types of questions are they looking at,  
8 because, you know, it's a fairly subjective legal  
9 analysis on which reasonable minds can disagree. So I'm  
10 wondering whether that's something that you have  
11 disclosed in the study.

12 MS. SCHOFIELD: Absolutely. When we write it  
13 up you'll have exposure to all the questions that we  
14 have asked. So it's a really good question and it's a  
15 really big challenge, Sandra, and what we've tried to  
16 do is we first of all tried to strip out as much  
17 judgment as we can so we're not asking is something --  
18 does this look like it's a possible fair use. Instead  
19 we're asking questions like can you estimate the amount  
20 copied and they will say either, you know, 100 percent  
21 or, you know, they have variations, for example, for  
22 the amount copied.

23 And they are not asked specifically what we  
24 would consider like the analysis of fair use, instead  
25 they are asked to tag things about the material. So

1 they are asked to tag if, for example, the item appears  
2 to be contextualized with text and with surrounding  
3 information or they're asked questions like -- I'm  
4 trying to think of some good examples for you. I can't  
5 think of many off the top of my head, but it's actually  
6 breaking down the four factors and trying to get at  
7 situational characteristics that would unearth that  
8 sort of question as to whether there might be a fair  
9 use defense going on. And I can share some of those  
10 with you further.

11 MR. OLIAR: I'm Dotan Oliar from the  
12 University of Virginia. I was just curious, in one of  
13 your last slides you had the list of people you were  
14 talking to and analyzing and I was wondering if you are  
15 also interviewing end users and whether you're  
16 analyzing also counter-notices because they are also a  
17 target audience for those takedown notices.

18 MS. SCHOFIELD: Yeah, that's also a good  
19 question. So we have decided not to -- in the  
20 interview series we're not interviewing end users.  
21 It's just a category that is too wide and varied for us  
22 to really wrap our hands around and to be able to say  
23 anything about from a research perspective. So that  
24 part of the research is really examining the practices  
25 of those that are taking action within the system.

1                   On the other side for the coding engine  
2   portion of it, we're actually looking at  
3   counter-notices there. As you probably know, they're  
4   few and far between. So there's actually not very many  
5   of them within the Chilling Effects database, but we  
6   are looking at those.

7                   MR. OLIAR: Just for a quick-follow up, so  
8   maybe you could talk instead of individual users which  
9   maybe is a large group, representative organizations,  
10   NGOs that represent users or care about users may have a  
11   good idea of what users' concerns are. And I have no  
12   doubt that the number of people sending counter-notices  
13   is a very small fraction of people receiving notices.  
14   But still, these are the people, you know, we at least  
15   care about - right? maybe the system does have some false  
16   positive. But at least if we can minimize the people who  
17   are unjustly hurt by the system who may not have the  
18   legal knowledge or the time or may be scared and, you  
19   know, may just, you know, let it go though they think  
20   they may have good reasons, if we can minimize those, I  
21   think that will be a good thing.

22                  MS. SCHOFIELD: Absolutely. I think the idea  
23   of talking to representative organizations is a good  
24   idea. You know, we're also hearing issues that get at  
25   this aim from both rights holders and the online

1 service providers who do interact with users and do  
2 have an idea of what's going on. But I think that I  
3 will - I'm making note of your point to talk to  
4 organizations representing users as well, I think  
5 that's a good idea.

6 MS. SEIDLER: My name is Ellen Seidler. I  
7 have a concern about using the Chilling Effects  
8 database as being representative of takedown notices in  
9 general. As an independent film maker, I have sent  
10 thousands of upon thousands of takedown notices and  
11 only a small percentage of those have gone to Google.  
12 So you're missing out. I know it's the only database  
13 out there so you're sort of limited with regard to  
14 that, but I think it's an important caveat that the  
15 Chilling Effects database is a very limited subsection  
16 of the millions upon millions of DMCA notices that are  
17 sent out.

18 MS. SCHOFIELD: Thanks, Ellen. I absolutely  
19 agree with that and, you know, like I mentioned, if  
20 there's any other groups of people including senders in  
21 the room who would be willing to discuss sharing  
22 notices, we would be very happy to build out -- this is  
23 part of the idea behind building out separate tranches  
24 so that we're not swamped by what's predominantly  
25 Google search data. But as you also mentioned, it's

1     what we have and it's where we're able to start because  
2     it's the data that's available.

3                 EAST BAY RAY:   I'm East Bay Ray from the  
4     Independent band Dead Kennedys.   I was wondering, you  
5     said this is supposed to be a neutral study.   Why is  
6     this database called Chilling Effects?

7                 MS. SCHOFIELD:   I'm sorry, I don't have any --  
8     I had nothing to do with naming the database.

9                 EAST BAY RAY:   You don't know why then?

10                MS. SCHOFIELD:   I cannot speculate why.

11                EAST BAY RAY:   When did you first look at it?

12                MS. SCHOFIELD:   When did I first look at it,  
13     probably about a year and a half ago when I embarked on  
14     this research.

15                EAST BAY RAY:   They changed their "About," but  
16     I have a screen shot which I didn't know I had to  
17     bring.   I'll have to look at the date on it.   The  
18     reason it's called Chilling Effects because they were  
19     alleging, the law centers and the EFF, that people  
20     sending takedown notices were chilling free speech.  
21     And that's why it's called Chilling Effects.   And my  
22     band is on there when I'm still -- you know, I was  
23     chilling free speech when it's had the different thing on  
24     it.   And to me it's very 1984 that it's called Chilling  
25     Effects.   I'm a legitimate copyright owner.   I was put

1 on there as an example of chilling free speech and now  
2 they've changed what they are about so people don't  
3 know, like you, but it's still called Chilling Effects.  
4 That would be like studying black people and calling  
5 them negroes. And you're clueless to why it's called  
6 Chilling Effects.

7 MS. SCHOFIELD: I appreciate your point of  
8 view. It's not something that's actually within the  
9 scope or control of my research. Ours is called the  
10 coding engine, so I hope that's sufficiently neutral.

11 EAST BAY RAY: What I'm trying demonstrate is  
12 bias because the whole principle of safe harbor is  
13 supposed to be based on neutrality. And when there's  
14 bias, then the whole concept of safe harbor gets a  
15 little wobbly. Thank you.

16 MS. PERLMUTTER: I would urge seconding  
17 Brianna's suggestion that anyone who has data, whether  
18 it's rights holders who are sending notices or ISPs  
19 that are receiving them, provide them to the project to  
20 the extent that's possible because obviously as Brianna  
21 said, the broader the scope of the data they can look  
22 at, the more valuable the results will be. So  
23 certainly add my suggestion to that.

24 Let me suggest that we move on and we will now  
25 go to the report of the working group from Sandra

1 Aistars and Jim Halpert.

2 MR. HALPERT: Well, we apologize for this. We  
3 probably should describe the state of play here and  
4 then we hope to be able to show you just representative  
5 snapshot of what the text looks like at this moment.  
6 But I think we'd just better start, I don't see any  
7 other -- given the time constraint, I don't see any  
8 other way to do it.

9 MS. AISTARS: There's a document that was we  
10 circulated to the working group list this morning by  
11 Rebecca Jones from my office that I think everyone  
12 who's in the meeting room from the working group should  
13 have. And that same document was made available to the  
14 USPTO at the same time and as we did after the last  
15 plenary session, we'll just do a quick scrub of it to  
16 make sure it doesn't have, you know, typos or errors or  
17 missing pages or something crazy like that. And then  
18 USPTO can post that to their website as they did after  
19 the last plenary session so that those who are watching  
20 on the webcast, those who aren't on the web  
21 distribution list for the working group all have a copy  
22 of where things stand and what the state of play  
23 currently is.

24 If we get it in a way that we can display it  
25 on screen, that will be great but otherwise we'll just



1 walk through and describe the provisions that we're  
2 working on right now. When you do see the document,  
3 what you will see is a document that is largely clean  
4 text and there are certain areas that are bracketed  
5 that are still under discussion. There are also areas  
6 that are highlighted in yellow. Those yellow areas  
7 represent the sections where we had the most active  
8 discussion in yesterday's working group meeting.

9           And so those are areas where we were doing  
10 active drafting on the fly where we were capturing the  
11 group's discussions. But the group itself has not had  
12 a chance to review either Jim's or my notes on the  
13 topic. So those are truly active sections of the  
14 document. But the entire document as a whole is a  
15 discussion draft and once we get through this whole  
16 process and we've got a solid draft that has everything  
17 in it, we'll still need to do a scrub and make sure  
18 that everything works the way it's supposed to work and  
19 that there aren't any unattended issues in the  
20 document. So you should consider the entire document  
21 as, you know, as a discussion draft still being, you  
22 know, still being negotiated by the parties.

23           But I think at this point in time is fairly  
24 complete, represents all the areas that we're  
25 discussing and represents I think a lot of forward

1 progress since the last time we met and there were just  
2 big empty chunks in a lot of the sections that we  
3 were talking about, so...

4 MR. HALPERT: There's a lot of progress in  
5 flushing out issues. So if you read through this  
6 document, whereas there were gaping holes as of the  
7 September 10th meeting at the Patent and Trademark  
8 Office, now there's at least text with a few  
9 highlighted, yellow highlighted gaps where we may try  
10 to insert new concepts.

11 But we basically have been all the way through  
12 the document with I think three sets of drafting group  
13 meetings between September 10 and today and a working  
14 group meeting yesterday afternoon, which many of the  
15 people in this room attended, and as a result of that I  
16 think most -- almost all the issues have been aired and  
17 people are working constructively to find middle ground  
18 to address them. And the -- if we are able to continue  
19 at this pace, we should have a draft to go out for  
20 comment in the -- certainly by December that has been,  
21 you know, reviewed thoroughly so that it's consistent  
22 and we have ironed out the language, ideally simplified  
23 language from what you see now because negotiated texts  
24 tend to be a little overwritten but.

25 With that we hope to be able to report at the

1 next meeting with a draft that then the public can  
2 review and comment on and that the full participants in  
3 these plenary meetings, anybody should -- who's  
4 interested should attend or should connect in by phone  
5 and you should have by the next meeting, I'm hopeful,  
6 the opportunity to review a full text and we look  
7 forward to comment on that when it's ready for comment.

8 MS. AISTARS: Right. So let's just walk  
9 through, the form of the document remains as it was.  
10 We've set out several categories of practices, good  
11 practices, bad practices and situational practices and  
12 those are identified both for people who send notices  
13 and people who receive notices. And in terms of people  
14 who receive notices in various respects they are broken  
15 into practices that apply to service providers who work  
16 using web forums versus service providers who work  
17 using e-mail to receive notices because some of the  
18 practices will vary.

19 So, Jim, why don't you start and while Jim  
20 will walk through the areas that apply to service  
21 providers and I'll walk through the ones that apply to  
22 notice senders. And we're happy to take any comments  
23 on things that might not be clear.

24 MR. HALPERT: So the first of the good  
25 practice is to make -- for service providers is to make

1 the DMCA takedown notice and counter-notice mechanisms  
2 easy to find and easy to understand so that both  
3 notifiers don't have to hunt or go -- aren't burdened  
4 trying to find the material, the same thing for  
5 counter-notifiers. And also the process is described  
6 in a way that it's easy to use and there are a series  
7 of examples. And typically the way we've been resolving  
8 these good practices is to provide a list of such as's  
9 that provide examples of ways to accomplish the goal  
10 that are not exclusive but that give guidance to  
11 review -- to readers who are not well versed in this  
12 process and are coming to it for the first time. Some  
13 concrete ideas about how they might accomplish the good  
14 practice.

15 The second transparency element here is to  
16 provide clear plain English explanations consistent  
17 with the DMCA requirements of who can submit a notice,  
18 what information should be submitted to comply with  
19 DMCA requirements and what additional information can  
20 facilitate the removal of alleged infringing content.  
21 Later in the document we describe when requesting  
22 additional information beyond the DMCA requirements, it  
23 may be an appropriate process and some considerations  
24 of where that could be inappropriate requesting a lot  
25 of additional information that's not required. But

1 here we just flag that as a good practice.

2 We also talk about implementing processes for  
3 receiving notices that are commensurate with the level  
4 of good faith claims of instances of infringement --  
5 this language has been changed a little bit overnight  
6 and we haven't vetted the language completely -- sought  
7 to be submitted by rights owners. So the idea is to  
8 make it easier for rights owners to submit information  
9 including multiple URLs being submitted at one time,  
10 use of e-mail or use of a web form that can accommodate  
11 multiple URLs, or through uploading text files and then  
12 offering, where appropriate, we go into this again in  
13 the contextual practices at the end, methods for  
14 submitting larger volumes of notices. And those --  
15 that's something that we will touch on later.

16 And then also having -- there's a suggestion  
17 that additional efficiency may be achieved by  
18 establishing a standard document structure for e-mail  
19 or for uploaded text files so that the information can  
20 be submitted in a regular way by notifiers and it's  
21 also easier for the service provider to handle as the  
22 service provider reviews the submissions.

23 MS. AISTARS: It's worth noting that we have  
24 had discussions within the working group and the  
25 drafting group early on to explore what those sorts of

1 examples of, you know, standardized document structures  
2 or e-mail structures might look like and that's  
3 something we may return to and revisit to offer up as  
4 examples or appendixes to the documents so that people  
5 don't have to figure it out for themselves.

6 MR. HALPERT: And this would be a task to turn  
7 to after we get the good and bad practices document out  
8 for comment. The idea behind this would be not to  
9 prescribe a specific form that should be used but to  
10 offer a sample that -- or a series of samples that  
11 different rights owners and service providers might  
12 want to refer to as the develop their own or might just  
13 want to pick up and use themselves.

14 And then there's also a recommendation for  
15 compliant notices, notices that meet the DMCA  
16 requirements to provide a confirmation of receipt of a  
17 notice or a counter-notice that includes a method to  
18 identify the notice or counter-notice in further  
19 communications. The concern had been that notices  
20 would sometimes go into some black box and there would  
21 be no way to refer back to it to find out what had  
22 happened to the notice. And here there are examples of  
23 a copy of a completed web form or a confirming e-mail  
24 saying what had happened in response to the notice.

25 A fifth good practice is explaining to

1     submitters that DMCA notices and counter-notices are  
2     only accepted for copyright infringement claims, where  
3     applicable, and that there are legal sanctions that  
4     apply for some knowing and material misrepresentations  
5     in DMCA notices. This is to discourage the submission  
6     of irrelevant or noncompliant notices that can clog the  
7     practice -- clog and slow down process.

8             Then there is a bracketed item that was just  
9     raised, this was a suggestion from an AT&T lawyer who  
10    commented on this, that there should be some good  
11    practice with regard to reinstating in a timely fashion  
12    material that was improperly or inaccurately identified  
13    as infringing in DMCA notice and as to which a  
14    counter-notice was submitted. So that's sort of a  
15    replacing back online good practice.

16            We then are looking for any suggestion, this  
17    is -- these are just general good practices for service  
18    providers with regard to notice and takedown. And  
19    we're asking if there are -- and you'll see in the  
20    document and highlighted in yellow whether there are  
21    suggestions for syntax for e-mails or sample e-mails  
22    that would make processing e-mail notices more --  
23    easier both for notifiers and for recipients. So if  
24    there are service providers out there that handle a lot  
25    of e-mail notices, you guys may want to suggest and

1 would appreciate receiving suggestions on good  
2 practices in that regard.

3 Then for web form submission, which a number  
4 of service providers use as a way to increase efficient  
5 internal processing of submissions, all the same good  
6 general practices would apply as to service providers.  
7 And then the further good practice specific to web  
8 forms are to have clearly labeled fields marking which  
9 information is mandatory because required by the DMCA  
10 and which fields are requested to enable better  
11 processing of the notice.

12 Another is to provide sample text or help  
13 buttons and instructions to help explain what  
14 information is being requested so that the notifier,  
15 particularly smaller notifiers, understand what this is  
16 and what they are being asked to do.

17 And then the -- there is a further suggestion  
18 to employ industry standard features that promote  
19 efficient submission of forms such as avoiding  
20 server-side settings that disable auto complete  
21 features that -- and employing practices similar to  
22 those used for online sales transactions as a standard  
23 matter wherever possible to retain properly entered  
24 data so that the notifier doesn't have to go retype  
25 information multiple times. And the idea is here to



1 promote efficient submission on the notifier's side but  
2 using practices that are common for internet sites  
3 generally and e-commerce in particular which typically  
4 have -- for purchases have people filling out forms.

5 A fifth recommended -- or web form good  
6 practice or fourth I should say because there's the one  
7 catch-all for all the other good practices that are just  
8 generally applicable, is to explain why a notice or  
9 counter-notice submission is rejected to allow the  
10 sender to efficiently correct the submission and  
11 resubmit.

12 There has been on the service provider side  
13 concern about junk providers of very, very large  
14 numbers of notices who know what they are doing, and I  
15 think we'll need to qualify this a little bit to say,  
16 look, if there's a noncompliant notice, it's good to go  
17 out the first time and say correct this, but that may  
18 not be necessary or appropriate where the sender knows  
19 perfectly well that they are not complying with the,  
20 say the mandatory elements of the notice and the duty  
21 to respond to that, to willfully inaccurate notice  
22 sender, may be an inefficient waste of time. But the  
23 idea is for submitters who are acting in good faith,  
24 notifiers, to tell them why their notice was rejected  
25 so they can fix it.

1                   And then the further good practice is well,  
2   having these efficient intake processes also to  
3   implement reasonable measures to deter fraudulent,  
4   erroneous or abusive submissions which are a source of  
5   significant inefficiency.

6                   So that's the list. I don't know if anybody  
7   has any comments on further good practices for service  
8   providers with regard to receipt of notices, but this  
9   is the list that we have come up with. Feel free to  
10   e-mail me and Sandra and anyone else with suggestions  
11   of other good practices. These are the ones that the  
12   group has worked through and is pretty close as a  
13   drafting group matter to having language to share  
14   publically. There are parts of the draft that need  
15   more work.

16                  Any comments thus far?

17                  Sandra, do you want to take over good  
18   practices for notice senders?

19                  MS. AISTARS: Sure. Just to give context,  
20   both on how the good practices for the notice  
21   recipients and good practice for notice senders came  
22   about, a lot of this reflects discussion amongst the  
23   group participants about what is going on in the  
24   marketplace that works, what are the good practices  
25   that the members of the online service provider

1 community are already employing, why are they employing  
2 these sorts of good practices. And so the list that  
3 Jim reflects to you reflects a lot of things that members  
4 of the working group, you know, felt important to  
5 include as good practices because it's something that  
6 they feel provides for efficiency in receiving notices  
7 from notice senders.

8 And similarly the good general practices for  
9 notice senders also reflect things that notice senders  
10 are doing generally in the marketplace to comply with  
11 obligations that are imposed upon them and to ensure  
12 that they are living up to the requirements of the DMCA  
13 and that they're sending good notices. The idea  
14 amongst all of the working group participants is that,  
15 you know, most of the people who are participating are  
16 fairly experienced in sending or receiving notices and  
17 are able to flag the problems that happen on both sides  
18 in this process.

19 And so the document attempts to help put  
20 forward practices and guidance for folks who might not  
21 have the same depth of experience as the working group  
22 participants do and to collect in a place things that  
23 people should be thinking about as they send notices or  
24 as they receive notices.

25 So in terms of good general practices for

1 notice senders, the first practice identified is a good  
2 faith submission of all of the information that's  
3 required by Section 512© and it's been flagged by  
4 online service providers that often their operations  
5 are slowed down by receiving incomplete notices or  
6 notices that are inaccurate or don't comply with all of  
7 the requirements. And so making sure that people  
8 realize that they are asked for this information for a  
9 reason.

10 Submitting takedown notices requested as  
11 section -- sorry -- we got a little -- right. So  
12 another issue that was flagged in our discussions is  
13 that in certain instances online service providers  
14 receive takedown notice requests that are framed as  
15 Section 512 notices but they are really not referring  
16 to copyright infringement or unauthorized use of  
17 copyrighted works, but they are, in fact, relating to  
18 things like trademark issues or violation of community  
19 guidelines or something of that nature. So a good  
20 practice would be to ensure that you're submitting your  
21 notices only regarding copyright matters.

22 MR. HALPERT: I'd add one clarification. It  
23 would be okay to submit other things, other complaints  
24 to service providers. No implication to say don't  
25 submit things. But don't style a request relating to

1     defamation or trademark infringement as a copyright  
2     notice and takedown request because that's going to be  
3     confusing and will slow down the process.

4             MS. AISTARS: Right. One topic that we've had  
5     a good bit of discussion about is how to ensure that  
6     notices  
7     that are submitted are both pointing to the online  
8     location at which the alleged unauthorized material is  
9     residing and that that's accurate information that the  
10    online service provider can act on. And also that the  
11    material that you're pointing to is actually being used  
12    in an unauthorized fashion that's not authorized by the  
13    copyright owner, its agent or the law.

14            And so we have had discussions in the group to  
15    try and provide guidance, not just in terms of  
16    providing kind of an overarching request that people  
17    take, you know, good faith efforts to do this, but  
18    actually we've outlined a variety of steps that we know  
19    of that people are taking in the marketplace today that  
20    we think are effective in helping to ensure that you're  
21    pointing to information that is actually located where  
22    you say it's located and that it's actually, you know,  
23    an unauthorized use.

24            So some of those are identified and this is  
25    particularly important where automated tools are being

1     used, but the way that the language is drafted, it  
2     applies both to instances where somebody is sending  
3     notices on an individual basis where a human being is  
4     involved sending each and every one of the notices as  
5     well as to situations where automated tools are being  
6     used.

7                 So the overall guidance is that before  
8     submitting a takedown notice it's good practice to take  
9     measures that are reasonable under the circumstances to  
10    ascertain the online location at which the alleged  
11    infringing material resides and to appropriately  
12    consider whether the use of the material identified in  
13    the notice in the manner complained of is unauthorized  
14    by the copyright owner, its agent or the law.

15                And then when you're using automated tools of  
16    various types to search for and send the notices, there  
17    are a variety of practices, some of which include  
18    conducting a human review of the site to which notices  
19    will be directed to ascertain whether the site is  
20    particularly likely or unlikely to be hosting or  
21    linking to material that infringes copyright so that  
22    you're directing notices at sites that, for instance,  
23    are unlicensed sites or are sites dedicated to  
24    infringement rather than ones that you've authorized to  
25    use your materials.

1           Establishing search parameters to the  
2   copyright owner or its agent that you believe will  
3   efficiently identify the unauthorized files while, you  
4   know, minimizing the inadvertent inclusion of  
5   authorized files. And in addition to using things like  
6   keywords and titles of the copyrighted work, using  
7   additional metadata where you can to help indicate --  
8   to help narrow the types of files that you're turning  
9   up.

10           So things like the size of the content file  
11   might be useful in identifying the location and the  
12   unauthorized use of file in these circumstances.  
13   Regularly conducting spot checks to evaluate whether  
14   the search parameters that you've set are actually  
15   returning the expected results and adjusting the search  
16   parameters as you need to in order to provide more  
17   accurate results.

18           And then other practice suggested is in the  
19   instance where there is information provided by the  
20   service provider that your notice systems are  
21   generating significant numbers of notices that are  
22   inaccurate to identify the online location or that are  
23   producing files that are actually not pointing to  
24   unauthorized uses, to work with the service provider  
25   and make good faith efforts to try to correct the

1 issue.

2                   So these are all practices that we've, you  
3 know, we've discussed, they're currently highlighted  
4 for further discussion and review. But I think we're  
5 in pretty good shape with those in terms of practices  
6 that we're aware of and that we recommend.

7                   MR. HALPERT: And to be clear for the internet  
8 users in the audience and tuning in over the phone and  
9 watching a webcast, if this is actually being webcast  
10 live, which would be kind of cool. This provision is  
11 also intended to address uses not simply that are not  
12 authorized by the copyright owner but also uses that are  
13 non-infringing generally.

14                   So the -- rather than trying to spell out what  
15 is fair use in a document like this that would be  
16 very -- would require pages and pages and pages and would  
17 still be a case-by-case analysis, the focus here is to  
18 address issues of licensed works and of uses, for  
19 example, of remixes that are transformative works and  
20 whatever it would be under the question of whether the  
21 use is authorized by the law or not.

22                   And the -- but we're addressing this not as a  
23 separate fair use section which would be too difficult,  
24 frankly, and too long, but rather treating this  
25 question of whether the notices are really relating to



1 infringement as an accuracy question. So in this  
2 there's a fair amount of back and forth to come up with  
3 the right words, but this is something where we hope to  
4 obtain agreement of the rights owners of internet user  
5 representatives and service provider representatives  
6 and continue to work on this language you see in the  
7 current snapshot.

8 But we've made a lot of progress in the past  
9 roughly three weeks and are hopeful of getting an  
10 agreement that's balanced and reflects all the different  
11 interest here.

12 Oh, sure, there may be some -- there have been  
13 some suggestions about a way to be able to tell on the  
14 face of the notice or to have more information about  
15 whether the notifier really is -- or what general type  
16 of rights owner the notifier is acting on behalf of,  
17 not the individual artist, but if there's a company or  
18 something who's hired the notifier in an agency  
19 situation. And this is complicated for a variety of  
20 different reasons, but there's a placeholder bracket  
21 for further discussions on that.

22 And there have been suggestions about drawing  
23 on educational materials to educate users about online  
24 infringement as well as potentially some education to  
25 users if the rights owner wanted to that would be

1 available online, could be linked to from a notice, for  
2 example, or from the service provider site giving  
3 internet users some informative information so that the  
4 notice and takedown process is also an educative  
5 process rather than simply the mechanical posting and  
6 removal and then reposting of content.

7 MS. AISTARS: And I think for both of these,  
8 those aren't likely to be issues that would be reflected  
9 in text in a document like this but rather something  
10 where the working group members would come to some  
11 suggestion that we would make to the larger community  
12 as to, you know, how or whether to approach the issues  
13 and there are other groups that we might suggest  
14 working with if the group agrees that they are  
15 important to approach.

16 MR. HALPERT: This could be a potential  
17 further workstream for the -- if the people involved  
18 in the multistakeholder group think that it's  
19 worthwhile.

20 MS. AISTARS: So moving to bad practices --  
21 that's the service providers, okay.

22 MR. HALPERT: So what may be most -- these  
23 good practice are examples. What may be of greatest  
24 potential significance in how this was applied or ever  
25 referenced by a quarter or other entity is also to have

1 a list of bad practices, both to discourage people  
2 coming to this in good faith and also to identify some  
3 practices that really raise serious potential obstacles  
4 to the efficiency of the notice and takedown process  
5 and the integrity of that process.

6 So for service providers, we thought about a  
7 series of these and Sandra -- the Copyright Alliance  
8 did a good job of presenting a bunch of these at the  
9 first meeting at Berkeley. They did a report showing  
10 what some actors were up to. And the first was hiding  
11 intentionally the procedure for submitting a 512© or  
12 512(d) takedown notice or counter-notice.

13 Sandra had wonderful slides showing how hard  
14 it was to find the designated agent on a bunch of sites  
15 or having paid advertisements people have to click  
16 through, that sort of very slimy stuff. That ranks  
17 you're Letterman and you're coming up with the top, I  
18 guess, five. That struck us as the first one to put  
19 in.

20 The second one was requiring -- this is sort  
21 of similar, notice and counter-notice -- or  
22 counter-notice submitters to watch advertising or  
23 provide anything of value as a precondition to  
24 submitting a notice or counter-notice claim like  
25 registering or having to do other things online, which

1 just further gums up the process and is inappropriate.

2 Then the third one, this one we still need to  
3 work on the language a little more, but using arbitrary  
4 mechanisms that are designed to make the notice and  
5 takedown process inefficient or difficult. The classic  
6 example is the use of multiple Captcha codes where if  
7 you make a mistake, you'll have to start again and  
8 resubmit the information. Having cool down periods  
9 between submissions of notices or counter-notices that  
10 are deployed in a manner that really are intended to  
11 very much slow down the notice submission process.

12 On the other hand, and using other sorts of  
13 arbitrary mechanisms that are intended to significantly  
14 hamper the ability of a rights owner to send or  
15 multiple rights owners to send notices, sufficient to  
16 address the scale of infringement on the site.

17 And then we also will have in here a notice --  
18 a reference back to the situational or contextual  
19 practices at the end about security measures. We've  
20 already identified security measures as a good practice  
21 and the question is how they are used and they not be  
22 wielded intentionally as a way to slow down submission  
23 of compliant notices.

24 And then our number 4 on this list, and  
25 actually we only have four right now and maybe there

1 will be some others added. Using stigmatizing or  
2 intimidating language which risks and we might add is  
3 designed to chill submission of legitimate takedown  
4 requests or legitimate counter-notices. This is  
5 something where the group has to go over this and come  
6 up with precise language, but we heard a lot about and  
7 even heard a little bit from East Bay Ray earlier about  
8 the abuse that some rights owners, Ellen Seidler spoke  
9 to this too at Berkeley the last time we were here,  
10 abuse that notifiers, particularly individual notifiers  
11 have to undergo when they submit what's a legitimate  
12 takedown notice about an infringing use of their work.

13 So those were the bad practices. And, again,  
14 if there are others that you think, even if you have  
15 not been involved in the working group or in the  
16 drafting group that you think ought to be included,  
17 please send them by e-mail to me and Sandra and we'll  
18 make sure that they are addressed in the process.

19 Then for service providers, specifically when  
20 e-mail is the submission mechanism, we're asking  
21 whether there are any bad practices particular to  
22 e-mail. We have asked this for about three months,  
23 haven't heard anything, but if you know of any, please  
24 do send them to us and we're delighted to use them.  
25 Same thing for bad practices with regard to web forms

1 specifically. And, again, we may have some particular  
2 things for that -- that particular interface seems to  
3 raise some more issues and if you have suggestions,  
4 please send them along.

5 We'll also be adding if we can get a hold of  
6 Ron Yokubaitis both good and bad practices with respect  
7 to Usenet, but again that's just a gap right now.

8 Sandra.

9 MS. AISTARS: Yeah. So then moving to bad  
10 general practices for notice senders, we are discussing  
11 actively issues related to how to properly direct  
12 notices, particularly 512© notices, to the right  
13 entities. And I think we still need to bottom out  
14 exactly on how we address that, but the idea is that if  
15 you know that the allegedly infringing material or the  
16 activity doesn't reside on the service provider's  
17 system or networks within the meaning of 512© and you  
18 have -- the entity who you're directing the notice to  
19 really has no way of addressing the issue that you're  
20 raising, you should not be directing notices to that  
21 entity.

22 There's enough discussion as to, you know,  
23 entities who are hosting providers and, you know, where  
24 and when it's appropriate to direct notices to those  
25 entities and I think we still need to further discuss

1     that before -- before bottoming out on language on that  
2     issue. But that's an issue that is tagged for  
3     discussion here.

4                 MR. HALPERT: The distinction here is between  
5     entities that actually host the online location,  
6     website, whatever it is and an entity of underlying  
7     infrastructure who's basically providing the power and  
8     maybe the connectivity of the location but doesn't have  
9     the ability to take down material.

10                We need to think about an appropriate balance  
11    there where the rights owner who's not getting a  
12    response from the actual website host who's in a  
13    position to take the material down will under some  
14    circumstances want to contact the provider of a huge  
15    data center capacity and we need to figure out what  
16    would be an appropriate description of a bad practice.  
17    There are notifiers who send millions of -- up to a  
18    million notices when they are frustrated that the  
19    individual website hosts are not responding to the data  
20    center operator and that's clearly inappropriate, but  
21    we have to sort of parse through at what point it  
22    becomes inappropriate to do that. Sorry.

23                MS. AISTARS: Right. As I said, it's an open  
24    discussion because the countervailing issue that needs  
25    to be considered is, you know, not cutting off the

1 ability for people to kind of work their way up the  
2 chain if there is a legitimate connection between the  
3 content and the notice being sent.

4 I see Vicki has a comment that she wants to  
5 make.

6 MS. SHECKLER: Vicki Sheckler with Recording  
7 Industry. Jim, as you know, we do have an issue with  
8 that concept. We do believe that 512© applies not  
9 only to the website operator but also to the hosting  
10 provider underneath. We understand that there are some  
11 instances where we need to work out an arrangement to  
12 deal with that. But just for the record, we do feel  
13 strongly that it is appropriate for everyone that  
14 claims 512© safe harbor status to be able to take  
15 notice and then process it. Thank you.

16 MS. AISTARS: So moving to further bad  
17 practices that have been identified. A lot of these  
18 are kind of parallels to what we have identified as,  
19 you know, good practices. For instance, sending  
20 notices only reflecting copyright matters and sending  
21 notices only when you're actually entitled to send  
22 notices on behalf of a particular actor. The flip side  
23 of that which has been identified as a bad practice  
24 here is falsely asserting that the notifier is  
25 authorized to act on behalf of the owner of an



1 exclusive right that's being asserted or similarly  
2 submitting invalid takedown notice requests for  
3 harassing or retaliatory purposes that don't have  
4 anything to do with copyright issues such as trying to  
5 silence a critic or with the goal of disrupting the  
6 business of a competitor. Those are all things that  
7 we've identified as bad practices.

8 We have also clearly set out, again, as a flip  
9 side to the good practice identified earlier that it's  
10 a bad practice to submit a DMCA takedown notice to  
11 assert rights other than copyright rights.

12 We have also set out as a bad practice a  
13 practice of repeatedly submitting 512 notices regarding  
14 URLs where the rights holder knows that the allegedly  
15 infringing material or the hyperlink has been reposted  
16 by the service provider in response to a valid  
17 counter-notice that, you know, contains all the  
18 elements that are set forth in 512(g)(3).

19 We're having a further discussion with the  
20 group on how to deal with issues where it's not that  
21 the notice has been or that the content has been  
22 reposted because of a valid counter-notice but rather  
23 that the content has repopulated automatically because  
24 it's a set of nested links. And in that latter case,  
25 at least certain members of the group feel that it's

1 appropriate to -- certainly appropriate to send  
2 additional notices and that it may additionally be  
3 appropriate to find a way to take action to remove  
4 those nested links based on the initial notice that's  
5 received if that's something that's within the  
6 structure of the site to do.

7 But, again, that's something that's kind of an  
8 open discussion item that we're trying to figure out  
9 kind of the scope of what that might entail. So it's  
10 just highlighted with bracketed language.

11 Kind of again the flip of what was asserted as  
12 a good practice, you know, the failure to take efforts  
13 to ensure that you have a good faith belief that you're  
14 dealing a copyrighted work, that the work is actually,  
15 you know, able to be found at the location that you're  
16 directing the online service provider to and that it's  
17 actually work that is being used in an unauthorized  
18 fashion and -- let's see.

19 And the last couple are kind of elaborating on  
20 those points. Failing to specify that the notice  
21 sender has a good faith belief that the use of the  
22 material is not authorized by the copyright owner, its  
23 agent or the law and failing to specify that the  
24 notice, in the notice, the 512© notice, which works  
25 are infringed or where the infringing work or the

1    hyperlink is located on the service provider's system  
2    or network so that it can be removed.

3               MR. HALPERT:   These are all going to providing  
4    enough information so that the service provider knows  
5    what to do and knows what the work relates to and how  
6    to find it.   But there are some people who don't want  
7    to go to that trouble and they submit a notice.   And so  
8    this is describing that as a bad practice.

9               On to the situational practices.   These are  
10   the ones that for which there's often a very good  
11   reason to do something, but not in all cases.   So they  
12   are balanced and there are three topics that we've  
13   designated or four topics that we've designated as for  
14   possible situational practices treatment, and many of  
15   them are dealt with or alluded to above but those are  
16   fleshed out here.

17              One is trusted submitter program, the idea  
18   being that here the senders have a good record of  
19   submitting accurate notices.   They want to submit a lot  
20   of them, they are authenticated each time, and where  
21   it's practicable for a service provider to implement  
22   that sort of program, it can yield significant  
23   efficiencies.   We go on to list some of the features  
24   that these programs may require -- or may include  
25   rather than may require.

1           By way of example of how to run one, you're  
2 going to hear more from providers and users of trusted  
3 sender programs after we sit down. So we will yield  
4 the floor shortly for that and you can hear more about  
5 it.

6           But the idea is to offer this as not something  
7 that needs to be done, but it's a process that can  
8 yield some significant efficiencies and the thrust of  
9 this document is to encourage efficiencies. So we go  
10 through both the -- we allude to some of the reasons  
11 why service providers might want to offer them up and  
12 then why rights owners might want to use them.

13           Second consideration, this is in yellow, I  
14 guess.

15           Do you want to cover this one?

16           MS. AISTARS: This was in yellow simply  
17 because it was discussed yesterday. But it's  
18 acknowledgment and status reporting. So in good  
19 practices we've identified already that it's a practice  
20 for service providers to provide confirmation of  
21 receipt of a notice and to provide the notice sender  
22 some method to identify the notice so that they can  
23 communicate better with the online service provider  
24 about particular notices that they have sent and they  
25 know, you know, what the online service provider is

1 referring to in further communications that might  
2 occurred.

3 This is a further elaboration on that point  
4 that where a service provider has the resources to make  
5 it practicable, if they can take additional measures  
6 such as providing a record of all of the URLs that they  
7 received from the submitter and providing the submitter  
8 with a record of the action that the online service  
9 provider has taken with respect to notice, that could  
10 provide additional efficiencies in the notice sending  
11 and receipt process in terms of ensuring that there's  
12 an accurate and complete exchange of information and  
13 that there aren't additional follow-up requests coming  
14 from the notice sender that the online service provider  
15 has to act on. So we have laid that out as an  
16 additional good step that people can take, you know,  
17 under the circumstances, you know, circumstances  
18 permitting.

19 The points that Jim alluded to as we were  
20 discussing the good practice of providing an  
21 acknowledgment is also captured here, the fact that if  
22 you are an entity who is sending repeated notices that  
23 don't meet the 512(C)(3) requirements and you appear to  
24 be doing so for harassing reasons or illegitimate  
25 reasons, those sorts of notices don't necessarily merit

1 a response. It's not good for the online service  
2 provider, it's not good for legitimate notice senders.  
3 It gums up the works for everybody and, you know,  
4 deters attention away, deflects attention away from  
5 action on legitimate notices. And so it might be  
6 reasonable to provide an explanation and a -- of the  
7 deficiency, you know, the first time that you get such  
8 a notice. But if you've got an entity that just  
9 persists in sending you kind of, you know, harassing  
10 notices that are deficient and harassing notices, you  
11 know, that is something to take into account when  
12 thinking about whether to take these additional steps.

13 MR. HALPERT: It might encourage them if they  
14 got a response each time they sent a notice. And then  
15 in terms of requesting additional information, again,  
16 like this acknowledgment, situational practice, this is  
17 alluded to above and then fleshed out here saying  
18 that -- requesting additional information that  
19 describes the work or a link to the legitimate version  
20 of the work can improve efficiency in some contexts,  
21 particularly where the title information alone is not  
22 sufficiently descriptive of the work to allow the  
23 service provider to identify it.

24 This can happen with photographs, for example,  
25 posted at the same location, or where multiple

1 copyrighted works are available at the same URL and the  
2 service provider simply with the URL isn't going to be  
3 able to find the specific works complained about,  
4 obviously if it's all of them that may be different, but  
5 where there are particular ones that are alleged to be  
6 infringing, the service provider really will -- to be  
7 able to act on the notice will likely need some  
8 additional information.

9           So this is a scenario where requesting  
10 additional information is a good -- is considered to be  
11 a situationally perhaps good or situationally to be a  
12 good practice.

13           With respect to these optional pieces of  
14 information, the service provider should consider  
15 whether informing notifiers that the information would  
16 encourage efficient submissions or aid in identifying  
17 works in question, it is going to be helpful to have  
18 that additional explanation of why this is required.  
19 And then there's, on the other hand, consideration that  
20 you don't want to request additional information where  
21 the notifier has already provided enough information to  
22 identify the work in question.

23           So there's a fine line here where there's not  
24 enough information to identify the work -- for the  
25 service provider to identify the work, and then this is

1 a good practice. When there already is enough  
2 information, it may well not be a good practice. So we  
3 tried to reflect that balance in the draft and the idea  
4 is probably to add some examples of this to be --  
5 without being exhaustive, but just to give examples for  
6 readers to understand where this additional  
7 information -- these additional information requests  
8 may be helpful and promote efficiency.

9 Ideally we will boil this down. Right now  
10 this is pretty wordy. But to give people an idea of  
11 the circumstances under which this may be a real plus  
12 for efficiency.

13 MS. AISTARS: Right. One area where this  
14 tends to come up is where a notice sender is requested  
15 to provide a link to a place online where an official,  
16 you know, original authorized copy of the work can be  
17 found and that often isn't something that is actually  
18 available online. In some cases, for instance, if  
19 that's like the answer key to test results or -- that  
20 are -- or to tests, that's not something that's going  
21 to be posted online.

22 So obviously it's a situational thing and, you  
23 know, care needs to be taken in how you ask for  
24 additional information and when you ask for it, and so  
25 that's what we're trying to reflect here.



1                   MR. HALPERT: Yeah. The draft may wind up  
2 with some of these examples reflected so that readers  
3 can -- without parsing tons of text can understand this  
4 more immediately.

5                   Then finally to Captcha codes. This has  
6 required a lot of work and it is still not done.

7                   MS. AISTARS: Yeah. So this is kind of going  
8 back and forth I guess more broadly than just Captcha  
9 codes because we all recognize that, you know, we're  
10 talking about Captcha codes now but, you know, security  
11 tools and technology tools evolve very quickly and so  
12 we may be talking about something completely different  
13 a few months from now. But generally the use of  
14 security measures as we've recognized in the document  
15 is something that's important for people who provide  
16 online services for a variety of reasons.

17                   So we've recognized it as, you know, a good  
18 practice in the document. But, nevertheless, the  
19 entities that send notices, whether they're entities  
20 who employ automated takedown systems or whether  
21 they're individuals who have to send notices manually,  
22 have identified that even the use of, in the instance  
23 of Captchas, even the use of single Captcha code can be  
24 challenging when sending large volumes of notices on  
25 the one hand through automated tools or when you're an

1 individual and you have to deal with a large number of  
2 sites sending, you know, one -- sending a notice about  
3 one URL per site.

4 And so while we've described it as a good  
5 practice to use security tools, on the other hand, we  
6 have described it also as a bad practice to use  
7 security tools in an arbitrary fashion in a manner  
8 that's intended to make the submission process more  
9 difficult.

10 We're also recognizing in this kind of  
11 situational language that, you know, even when you're  
12 not trying to make the sending of notices difficult,  
13 just the nature of these tools can present a challenge  
14 and that's something the group recognizes is an issue  
15 and that there are various ways that people may  
16 consider workarounds, whether those are using trusted  
17 sender programs where you're already pre-authenticating  
18 somebody and so you don't need to employ those tools,  
19 in a particular trusted sender program, or whether  
20 you're allowing the submission of a large number of  
21 URLs using just the single Captcha code to try and  
22 alleviate that burden or whether you're allowing  
23 recourse to other modes of sending notices such as by  
24 e-mail.

25 So those are just examples of workarounds that

1 we identified as possibilities. And, again, the this  
2 is language and kind of an illustration of the state of  
3 discussion as of yesterday around whatever 5:00,  
4 6 o'clock Pacific.

5 MR. HALPERT: And what you see is not agreed  
6 language, but we're continuing to work on the security  
7 measure side to come up with language that reflects  
8 legitimate need for security measures on many sites  
9 while suggesting ways to work around potential  
10 obstacles.

11 So that's the current state of play and we're  
12 going to continue to work hard and we hope have  
13 something for you at the next meeting.

14 MS. PERLMUTTER: Let me ask, we're running  
15 slightly behind but not terribly. That was an  
16 extremely substantive and informative description of  
17 what's been happening in the working group. I know I'm  
18 personally encouraged and excited by all of the  
19 thinking and effort that's gone into this by so many  
20 people, including many of you in the room.

21 We did want to give the opportunity for anyone  
22 in the room who isn't in the working group and also  
23 anyone who's participating remotely to ask any  
24 questions or make any comments before we take a short  
25 break and move on to the next topic on the agenda. If

1 anyone has anything they would like to say, please take  
2 this opportunity while Jim and Sandra are standing here  
3 to answer questions.

4 Yes, Corynne.

5 MS. MCSHERRY: I got an e-mail from someone  
6 would who would like to call in.

7 MS. PERLMUTTER: Hollis, do you --

8 MS. ROBINSON: Yes. For any anybody who's on  
9 the phone or wants to call in, the number is  
10 1(888)453-9955 and the passcode is 6039037.

11 MS. PERLMUTTER: And that information is  
12 available on our website as well if anyone didn't get  
13 it all as Hollis read it.

14 MS. MCSHERRY: I think the operator has to do  
15 something.

16 MS. ROBINSON: All they have to do is press.

17 MS. PERLMUTTER: Sorry. I think we usually  
18 say this at every event and we've probably started to  
19 get complacent and think that everyone knows.

20 MS. ROBINSON: For those on the phone, if you  
21 just hit star one and the operator will assist you and I  
22 do see we have two questions right now.

23 MR. NEILL: Good morning, everybody. This is  
24 Art from New Media Rights in San Diego. I just had a  
25 couple of comments and some questions as well. And of

1 course I'm just kind of looking at this this morning,  
2 so bear with me on some of the language.

3 So I think that one of the suggestions that I  
4 would have is in the good practices for notice senders,  
5 I would ask you all to think about including something,  
6 especially when you start talking about including  
7 language about automatic notifications and things like  
8 that. When you're talking about such a high volume of  
9 notices, we do see at New Media Rights, we work with a  
10 lot of individuals on both sides, who both send notice  
11 takedowns as well as there's been counter-notices.

12 And one of the problems is when people get  
13 content taken down, it can be difficult to get the  
14 content restored and sometimes it's very, very helpful  
15 and I think a very good practice by notice senders  
16 where they have learned that that material was  
17 authorized by the copyright owner, that they actually  
18 gave a license. Or that it actually was authorized by  
19 law to go ahead and take steps to help restore that  
20 content. And some folks do and some folks don't.

21 But anyway that's a good practice that I would  
22 suggest. That's more of a comment.

23 My question is also in that space of good  
24 practice -- I believe in the good practices for notice  
25 senders. The paragraph, and it's not a numbered

1 paragraph, I don't think, so I don't have the number,  
2 but maybe it is. Particularly, it's that paragraph  
3 that starts particularly where automated takedown  
4 notices will be sent to a site based on metadata, that  
5 particular paragraph. Some of the metadata that's  
6 cited is keywords, titles, file size, et cetera, and  
7 then it says conducting a human review of the site, you  
8 know, is a good practice. I was just wondering, what  
9 does a proper human review look like? I mean, I don't  
10 know what the -- I wasn't clear what that meant there,  
11 conducting a human review of the site to which notices  
12 will be directed to ascertain whether the site is  
13 particularly likely or unlikely to be hosting or  
14 linking to material that infringes copyright.

15 It sounds like -- I'm just trying to  
16 understand how specific, is that looking at the overall  
17 site or is that looking at to see if there are  
18 specific, actually specific infringing works on the  
19 site or just that the site can host infringing work?  
20 What does that mean, I guess.

21 MS. AISTARS: So I mean this is language as we  
22 said that is still being discussed by the group and  
23 that was, you know, just actively put forward yesterday  
24 for discussion. So I don't want to speak for the full  
25 group on it. You know, the idea here was that, you

1 know, you don't want to be sending notices to sites,  
2 for instance, that appear to be kind of wholly  
3 dedicated to, say, film criticism and, you know, they  
4 are not -- you know, they are not engaged in, you  
5 know -- you know, uploading entire copies of movies or  
6 anything like that. And so you need to really identify  
7 what the source, you know, what the target of your --  
8 of your notice sending is before you start sending it.

9 Similarly, it's a common practice among notice  
10 senders, especially when working with vendors, to  
11 provide lists of, you know, like white list sites of  
12 sites that are sites where licensed versions of their  
13 work are authorized to appear. And so those are the  
14 sorts of things that you want to, you know, exclude  
15 right away before, you know, starting an enforcement  
16 practice against a particular site.

17 But, in general, all of these practices here  
18 are listed, both here and in other places in the  
19 documents, are listed as examples that are, you know,  
20 given as guidance to people to think about, not as  
21 something that is intended to spell out, you know, you  
22 need to take these, you know, four, five steps and, you  
23 know, in every instance, you know, every member of the  
24 working, you know, agrees completely that, you know,  
25 this is exactly, you know, how we will conduct our

1 review, you know, before beginning.

2               So it's intended to be kind of helpful and  
3 illustrative rather than something that outlines  
4 absolute obligations or tries to prescribe something in  
5 an area that is ever changing. I think the tools also  
6 are improving in -- that people use and are improving  
7 in ways that actually, you know, may make -- you know,  
8 may make the human review in certain instances, you  
9 know, less useful. It also depends on the type of site  
10 you're dealing with. I mean, some sites you can't  
11 actually access the files, you know, when you're first  
12 approaching the site. So I think it's all --

13               MR. HALPERT: Contextual.

14               MS. AISTARS: -- contextual if you're dealing,  
15 you know, with a cyber locker, say, where the, you  
16 know, the links are not readily available from the, you  
17 know, front page of the site and so forth. So that's  
18 why the, you know, the overall introduction attempts to  
19 put all of this into the reasonable, you know,  
20 circumstances and the context that you're operating in  
21 in any given case.

22               MS. PERLMUTTER: We have a comment from the  
23 audience and then let's go to the other comment on the  
24 phone.

25               MR. SHEFFNER: Ben Sheffner with the Motion



1 Picture Association. I just want to build on Sandra's  
2 answer and she addressed some of this towards the end  
3 of her answer. But to address the caller's question,  
4 the kind of human review that would be appropriate is  
5 going to depend entirely on the nature of the site. As  
6 Sandra mention, there are cyber lockers which host vast  
7 amounts of infringing material where you won't be able  
8 to see anything past the home page of the site which  
9 doesn't even really display any of the infringing  
10 material itself.

11 There's other sites where it might have  
12 millions of pages that you could potentially review,  
13 but I don't think anybody is suggesting that it would  
14 be appropriate to review all of them. The idea is that  
15 before sending notices based solely on metadata, things  
16 like keywords or title or file size, et cetera, you  
17 should get some sense of the site. It's that kind of  
18 searching and sending of automated notices is more  
19 appropriate for a site that has vast amounts and vast  
20 percentage of infringing material is overwhelming as  
21 opposed to sites where you might just have relatively  
22 rare occurrences of unauthorized or infringing material  
23 and it may not be as appropriate to use simple meta  
24 database searches and that kind of thing.

25 So, again, to emphasize the kind of review

1     that would be appropriate is going to vary vastly  
2     depending on specifics of the site.

3                 MS. PERLMUTTER: Thank you. Let's go to the  
4     other question from the at-home audience.

5                 MR. HALPERT: There was someone else who was  
6     in the queue?

7                 THE OPERATOR: Three people. We have three  
8     questions in the phone queue, yes.

9                 MS. PERLMUTTER: Why don't we take all three  
10    in order.

11                THE OPERATOR: Okay. Our next question comes  
12    from Teri Karobonik.

13                MS. KAROBONIK: Hi, this is Teri from New  
14    Media Rights. I think one of the things that we should  
15    really consider going forward as we talk about  
16    particularly good general practices for notice senders,  
17    under three is that a lot of the times it's, in fact,  
18    not the copyright holder but a third-party agent who is  
19    hired to do nothing but send takedown notices. So I do  
20    think that's something we should at least mention and  
21    bring up in the guidelines as something that needs be  
22    considered some general oversight since working on the  
23    user side and also speaking to folks who use services  
24    like these, a lot them are independent creators. Some of  
25    them are more scrupulous or less scrupulous than others.

1                   So putting in some sort of language  
2   recognizing some sort of oversight of these groups just  
3   to make sure that the notices being sent on creators'  
4   behalf are actually legitimate. And if notice  
5   senders -- or if creators are noticing some pushback  
6   and a lot of the notices seem inaccurate, that's  
7   something that really needs to -- that the creator  
8   really needs think about going forward.

9                   MS. AISTARS: So the document is drafted not  
10   to make distinctions between notice senders, whether  
11   they are an individual or an agent acting on behalf of  
12   an individual. I think in the context of a document  
13   where you're talking about, you know, pure efficiency  
14   seeking additional legal obligations on I think you  
15   said independent individual artists, seems to be --

16                  MS. KAROBONIK: I think more of a general best  
17   practice when you're hiring an agent to work on your  
18   behalf. And maybe it boils down to good business sense,  
19   and many of the creators we work with already do this.  
20   But to keep in mind if you're hiring folks that aren't  
21   going a good job for you, maybe that's something that  
22   as a best general industry best practice, you should  
23   really think about going forward that maybe this isn't  
24   the company for you.

25                  Since as working on the small creator side,

1 this is new cottage industry where there isn't a lot of  
2 regulation, there isn't a lot of guidance at the  
3 moment. But folks are really are voting with their  
4 feet for these services. So I think providing some  
5 sort of general very basic guidance that, hey, you  
6 know, if you're going to hire someone to do your  
7 enforcement for you, you should make sure they are  
8 actually acting in your best interest.

9 MS. PERLMUTTER: Thank you. I think it's  
10 something that the working group can have a  
11 conversation about at its next meeting.

12 MR. HALPERT: Yeah, thanks Teri.

13 MS. PERLMUTTER: There's two more on the phone  
14 who is next?

15 THE OPERATOR: Our next question comes from  
16 Andrew Bridges.

17 MR. BRIDGES: Hi. Thank you all for this.  
18 I'm sorry I can't be there today. I wanted to raise a  
19 point that I didn't see in the draft this morning, and  
20 that is problems of the reality of bad faith notice  
21 construction and delivery by some copyright holders,  
22 particularly those who want to litigate large statutory  
23 damages claims over the question of whether notices are  
24 sufficient to --

25 MR. HALPERT: Can you speak a little louder,

1 please.

2 MR. BRIDGES: Okay. I'll do my best. I  
3 wanted to address the question of the reality of bad  
4 faith notice construction and the delivery by some  
5 copyright holders in order to set up large statutory  
6 damages claims where the issue in the litigation is  
7 the adequacy of the DMCA notices. Let me give several  
8 specific examples. For example, I'm aware of --

9 MR. HALPERT: Andrew, let me stop you for a  
10 second.

11 Do you have a suggestion with regard to the language  
12 that are not -- if you can frame these in relation to  
13 whether the language addresses the issue currently or  
14 not because a big part of the bad faith practices for  
15 notifiers is designed to address this. And so please  
16 do cite the examples, but also give us direction if you  
17 think it's not addressed by the current draft.

18 MR. BRIDGES: Well, I did not see this  
19 addressed in the -- these types of issues addressed in  
20 the document, maybe I missed something. But, for  
21 example, the sending of, let's say, 15-page faxes late  
22 at night on holiday weekends with no fax cover sheet,  
23 no numbering of the pages, no headers, no dates, no  
24 return address on the first page. A number of major,  
25 major service providers have no records of receiving

1 faxes that some copyright holders claim that they have  
2 sent. The use of screen captures of non  
3 machine-readable images as an alternative to capturing  
4 and cutting and pasting machine-readable text so that  
5 human transcription would be required by the service  
6 provider instead of working with machine-readable text.

7 Things like that where there are delivery  
8 mechanisms that appear to be designed specifically to  
9 impede the automated handling of notices and to  
10 introduce error in the processing and handling of  
11 notices. Maybe I missed it, but I didn't not see those  
12 types of --

13 MR. HALPERT: Those are not in there, Andrew.  
14 Do you have another one?

15 MR. BRIDGES: No, that's mainly it. It's bad  
16 faxes that are either illegible where the copyright  
17 owner won't replace them or faxes that are transmitted  
18 in a way that seem designed to provoke mishandling of  
19 the faxes upon receipt. These are just some examples.  
20 I wouldn't give more. But they are reality. These are  
21 featured in at least half a dozen, maybe a dozen cases  
22 I'm aware of with attorney's fees in the million of  
23 dollars and statutory damages claims in the billions of  
24 dollars.

25 MS. AISTARS: One place where we do -- it

1 doesn't address these specific examples, but one place  
2 where we do at least have a placeholder where I think  
3 we can make progress on this is where we refer to  
4 providing either standardized kind of submission  
5 formats or e-mail text formats that we want people to  
6 follow. So perhaps drilling down a little bit more on  
7 those areas with the group would be helpful to try and  
8 ensure that we are putting forward good examples of how  
9 to do things properly as well as just saying how not to  
10 do things.

11 MS. PERLMUTTER: If it would be useful,  
12 Andrew, maybe you can join in the next working group  
13 meeting or have additional conversations with the  
14 working group or the chairs to give some more of these  
15 examples.

16 MR. HALPERT: Yeah, that would be very  
17 helpful. Thank you.

18 MR. BRIDGES: Thank you, I'll be happy to do  
19 that.

20 MS. PERLMUTTER: And I think we had a third  
21 caller in the queue.

22 THE OPERATOR: Yes. Our final question in the  
23 queue right now comes from Rowena Cherry.

24 MS. CHERRY: Yes, and I wanted to ask -- three  
25 things I wanted to ask about. When you go to some of

1     these sites where you've received an alert that they've  
2     got your stuff and you look for the metadata and you  
3     see your title and you see it's supposed to be by you  
4     and you look at the file size and it seems appropriate,  
5     but the only way to absolutely make sure that it is  
6     what it says it is is to download it. And I don't know  
7     how many people are too afraid of malware on these  
8     pirate sites to actually go ahead and download it.

9             What can be done for copyright owners there?  
10    You don't want to send a bad request, but on the other  
11    hand, you don't want to lose your work in progress by  
12    potentially downloading something that could be very,  
13    very harm full, in deed, to your livelihood and  
14    computer and so forth.

15            And then also I think we touched on torrents,  
16    but what is a copyright owner supposed to do if you are  
17    one of, you know, 200 e-books, for instance, on a  
18    certain torrent or in a large file where you don't own  
19    the total collection, but you own an element inside the  
20    collection?

21            And my third question was, what are people  
22    supposed to do about Ebay because obviously it's one of  
23    the bad practices sites and the sellers, how can you  
24    educate them when right now they are being told --  
25    there are people reselling rights, there are people



1 right now selling the rights to resell 29 Jeffrey  
2 Archer books and 65 Dean Koontz books and a whole  
3 collection of Robert Ludlum works. And is Ebay a bad  
4 actor in this because there seems to be no way to  
5 educate sellers on the site.

6 Thank you very much. Those are my three  
7 questions.

8 MR. HALPERT: I'll take the third one. The  
9 first sale doctrine remains the law in the United  
10 States and Ebay is emphatically not a bad actor, has a  
11 very well-functioning notice and takedown program.  
12 There may be a business discussion that you would like  
13 to have with Ebay about this, but there's nothing in  
14 the law right now that would prevent somebody from  
15 reselling books. There aren't -- this isn't like  
16 scalping tickets in some -- concerts event tickets in  
17 some parts of the country.

18 So I don't think -- I don't believe that what  
19 they would be doing -- what was occurring on their  
20 platform would necessarily be the subject of  
21 infringement and so may be out of scope for our work.

22 MS. PERLMUTTER: I think the other question is  
23 the extent to which that involves problems with the  
24 operation notice and takedown system. So if there were  
25 those kinds of issues for any content that is

1     infringing, then obviously we would want to address it  
2     through looking at how the notice and takedown system  
3     is working.

4             MR. HALPERT:   Right.

5             MS. AISTARS:   I think with respect to the  
6     first two issues that Rowena raises and the challenges  
7     that copyright owners face, particularly individuals  
8     face in sending notices and investigating where  
9     material is located and ensuring that they're sending  
10    an accurate notice, those are points, you know, well  
11    taken and things that we have been trying to reflect in  
12    the drafting and some of the reasons, you know, why the  
13    language that you see highlighted in the best practices  
14    section is highlighted and has been, you know, somewhat  
15    challenging to come to agreement on because everyone in  
16    the working group certainly, you know, operates, you  
17    know, applying best practices and doing the best that  
18    they can and at the same time is aware that there are  
19    challenges beyond those that we can address ourselves  
20    even applying, you know, the good faith of everybody in  
21    the group.

22            So we're trying to keep the language cabined  
23    such that there is no obligation placed on a rights  
24    holder to, you know, take action such as, you know,  
25    investigating to the degree that you would have to

1 download a file and check it or click on it or whatever  
2 and put yourself and your computer at risk in order to  
3 be able to send a DMCA notice and similarly, you know,  
4 not putting you in a position where you have to, you  
5 know, do a sophisticated level of legal analysis on  
6 every affirmative defense that might arise prior to  
7 sending a notice. So those are all issues that we are  
8 aware of and contemplating.

9 MS. PERLMUTTER: Let me just interrupt  
10 momentarily with a message from your sponsor which is  
11 that we're now about half an hour behind on the schedule.  
12 So what I would like to do, I see there are three  
13 people lined up to make comments or ask questions. If  
14 I can ask each of them to be brief and then I would  
15 suggest if people are willing that we forego a break  
16 and work through so that we can get to our panel this  
17 afternoon. Obviously anyone should feel free to take a  
18 break on their own. So if that's acceptable, then  
19 let's continue. And I see Keith --

20 MR. KUPFERSCHMID: It's Keith Kupfershmid from  
21 SIIA. I will be only about 30 seconds here. I want to  
22 address the caller's question about Ebay. We work  
23 very, very closely with them and one of the things I  
24 think they do well certainly is they do have a whole  
25 section of Ebay where they post educational material.

1    So we, for instance, have posted on Ebay site  
2    information about the first sale defense as Jim  
3    mentioned about things like OEM software and academic  
4    software and what you can and cannot do with them. So  
5    there is a section there and frankly it would be great  
6    if other ISPs sort of followed that model.

7               MR. OLIAR: Dotan Oliar from UVA Law. I have  
8    a question that's a bit more general about improving  
9    the procedures for the notice and takedown.  
10   Section 512 requires users -- requires copyright owners  
11   to submit their notice and state a good faith belief  
12   that the material is infringing, but users who are in a  
13   position to file a counter-notice need to state their  
14   legal position under penalty of perjury. So I was  
15   wondering whether there has been any study given to  
16   whether users can meet this heightened burden of  
17   stating a legal position under penalty of perjury and  
18   whether any changes to these procedures should be made.

19              MS. PERLMUTTER: Just to say, you know, among  
20   the parameters of this particular process is that we're  
21   not discussing any changes in the law. We're just  
22   looking at how we can improve the operation of the  
23   existing system. So we haven't been addressing that at  
24   this point. Not to say it's not a valuable issue to be  
25   discussed.

1 MR. OLIAR: Right. Yeah, I assume that it  
2 goes beyond the --

3 MS. PERLMUTTER: Yeah, thank you.

4 MS. MCSHERRY: But actually I think I can say  
5 a little bit to that part of the discussion, as  
6 everybody knows, has been a conversation about whether  
7 we want to include some practices with respect to  
8 counter-notices and making sure that counter-notices  
9 are accurate, too, which I think is a very valid thing  
10 to do.

11 I'm sorry, this is Corynne McSherry from the  
12 Electronic Frontier foundation.

13 I want to make a suggestion that it seems to  
14 me that we are at a point where we may want to invite  
15 thoughts from the larger community who isn't able to  
16 attend or be on the call with respect to this document.  
17 And I'd like to suggest, I know we are still in  
18 process, but I'm a little worried that if we wait until  
19 December to circulate something, then the document may  
20 feel sort of fully baked without sufficient opportunity  
21 for public comment.

22 So there's, you know, we have wonderful new  
23 technologies these days for soliciting comments from  
24 folks and input from people. So I think we should  
25 consider procedurally what's the best way to get wider

1 public comment.

2 MR. HALPERT: Corynne, I think that this is  
3 very valuable and important. I think this document  
4 needs to be considerably simplified before it's fair to  
5 send it out for public comment because people who are  
6 not lawyers at this point are going to have a hard time  
7 with the document. And once we have done that work,  
8 which presupposes, though, a certain amount of other --  
9 of ironing out a few of the remaining issues, then  
10 that's the most productive time to do it; otherwise,  
11 the overwhelming reaction to it will be why are there  
12 15 lines of text here, I don't understand them.

13 And I think we may be able to work in the  
14 working group, and I suggest this as one of our tasks,  
15 to simplify this document once the issues, for example,  
16 the issue of service provider good practices has been  
17 done for a while. I think we should go through that  
18 language and make it simpler and easier to understand.  
19 Once we do that with different sections of this, it,  
20 you know, subject others views, I don't know that  
21 there's any problem sending out parts of it before the  
22 whole thing is done.

23 But I don't want to send out language that's  
24 inconsistent because people will be annoyed by that.  
25 Or language just that's too legalese so that people

1 who aren't lawyers really have a hard time  
2 participating in the process and it imposes on their  
3 time, those are just quick reactions. But I do agree  
4 with you that this needs absolutely to go out for  
5 further --

6 MS. PERLMUTTER: We have already, I  
7 understand, hosted a prior version as a draft. I think  
8 anything that's been discussed which is a public forum  
9 is certainly open for people to ask to see. And we do  
10 want to post on our website things that people can see  
11 and comment on in any way that they wish to as soon as  
12 possible. So we will post whatever the working group  
13 gives us as being something that can be presented. It  
14 will not be any kind of formal government request for  
15 comments, but just merely an opportunity for people to  
16 see it and make whatever comment they might wish to do.

17 This is a good segue I think into the general  
18 question of what next steps are. So just to say, and I  
19 don't mean to cut you off, to put on the table that the  
20 last meeting of this full group that we currently have  
21 scheduled is December 10th, am I correct? December 15th  
22 in our office in Alexandria. So we need to be thinking a  
23 bit about what happens between now and then and  
24 thereafter.

25 We had been promising and intending and

1 pushing and hoping to have some output by the end of  
2 the year and I think with all the work that's been done  
3 and all the substantive results that have been achieved  
4 so far even though there's still work to be done and  
5 even though I realize it's not a definitive agreement,  
6 there's something that is worth putting forward in some  
7 form by the end of the year, some statement of good and  
8 bad practices and hopefully some sort of samples or  
9 standard forms, documents or e-mails that people could  
10 choose to use if they see fit.

11 So we certainly want to urge both thought  
12 about what can be put forward in what format before  
13 December 15 and after December 15. And then obviously  
14 the main topic at that next meeting on December 15 will  
15 then be what next. Is there more work that would be a  
16 available on the same issues. How do we handle the  
17 additional issues that were raised in the Green Paper  
18 and the comments that were submitted on this topic on  
19 the takedown notice and takedown topic. Are there  
20 other things still to be explored or not. And also  
21 does this forum think that a continued conversation  
22 would be useful or desirable on any other issues that  
23 you may wish to continue having conversations about.

24 So we will set aside most of the  
25 December 15th meeting for that conversation which



1 doesn't fully answer your question, but just to give  
2 some context.

3 MR. HALPERT: And that probably does  
4 presuppose our having something circulated in advance  
5 of that, meaning if we can do it to have some  
6 exposition so that -- it's hard to do this work without  
7 deadlines, but maybe we should aim to have something  
8 circulated a week before, if we can, so that there can  
9 be more concerted feedback and more folks can  
10 participate by phone or otherwise.

11 MS. PERLMUTTER: That would be good.

12 MS. AISTARS: I think what we have now  
13 actually has at least, you know, full text for all of  
14 the sections reflected in some fashion. So it's not  
15 like there are gaps that are totally left, you know,  
16 unfilled. So I think people can start collecting  
17 comments from their respective communities as we speak  
18 and filtering those into the drafting committee's work  
19 and the working group's work even before we get to  
20 December 15th. And I'd urge people to do that because  
21 I think that's just much more efficient than waiting  
22 until the plenary group and then, you know, realizing  
23 that there's something we haven't thought about and  
24 haven't reflected in the documents and it sets off a  
25 cascade of three or four other related issues that

1 people haven't thought about.

2 MR. HALPERT: We received some really helpful  
3 feedback just on the phone today, for example.

4 MS. MCSHERRY: I'll sit down after this, I  
5 promise. But one idea might be if there are -- the  
6 working group could consider, if there are one or two  
7 sort of specific issues that we would like to solicit  
8 input on, thinking about whether there's a forum for  
9 doing that as opposed to circulating the entire  
10 document for comment, which I agree as it currently  
11 stands might be kind of confusing, but -- for the  
12 general public. But if there are one or two issues  
13 where we would like to solicit input and collect it,  
14 you know, that might be an in between thing that we could  
15 do. So I'll just make that suggestion. We can talk  
16 about it further.

17 MS. PERLMUTTER: Thank you.

18 EAST BAY RAY: This is East Bay Ray again. I  
19 just had one comment on the document. I guess in -- I  
20 think we have to look at in the group, on I guess like  
21 September 30 or something, but there's a music site  
22 called Groove Shark which federal judges ruled against  
23 and then a couple of weeks later I have a printout of  
24 the code of one of the ad networks that is run by an  
25 ISP is back placing ads on it. I think the document --

1 might have to add a section about ISPs that have an ad  
2 network because then they start having a financial  
3 interest.

4 And, you know, Groove Shark has been, you  
5 know, judged at this moment to be in violation. They  
6 don't a safe harbor at the moment. So, anyway, I think  
7 we need to differentiate between an ISP and an ad  
8 network.

9 MS. PERLMUTTER: Yes. There certainly has  
10 been work done by ad networks and best practices that  
11 they've looked into relating to their functions.

12 Just one other word from our side which is,  
13 you know, I think what we need is to be able to produce  
14 something that is useful by the end of the year without  
15 necessarily trying to make it the most comprehensive  
16 statement that includes every possible issue one can  
17 think of. There will be opportunities to move on and  
18 discuss other issues as well. So please bear in mind  
19 that we would like to see if there's something that can  
20 be produced now to show that all your hard work has  
21 accomplished something in 2014 and then we can talk  
22 about how to structure an ongoing conversation about  
23 other related issues or whatever seems appropriate  
24 going forward at whatever pace you all choose.

25 MR. HALPERT: Thanks, everybody.

1 MS. PERLMUTTER: Thank you very much. Very  
2 helpful and interesting conversation. A lot of  
3 interesting ideas. We will now call up the panel to  
4 discuss the issue of trusted sender programs, which I  
5 think will also relate to the ongoing work of the  
6 working group as well.

7 Let me just say that I unfortunately have to  
8 catch a plane. I will be leaving in 15, 20 minutes.  
9 Go until noon and the rest of the office and NTIA will  
10 be here.

11 MS. BLANK: Unless everyone planning on taking  
12 an assumed identity. I don't have for everybody  
13 because we kind of put this together. So if you want  
14 to take one that suits you or keep one that's up here;  
15 otherwise, we'll just have to introduce ourselves as we  
16 go. I guess I'm not going to try to be Shira  
17 Perlmutter, so I'll be myself.

18 And I apologize for those who we have no tags  
19 for. This is the section on trusted senders as you saw  
20 from your agenda. We thought that it would be helpful  
21 to invite members of our group here who are in the camp  
22 that send the notices and especially those who  
23 sometimes use third-party vendors because we refer to  
24 that occasionally in our discussions, but we haven't  
25 had any in the room, so we can at least get some

1 insight. And also we have Fred von Lohmann who appears  
2 on every panel that we ever have. And he's going to  
3 talk a little bit how Google came to have the program  
4 they have and a little bit how it works and whatever  
5 else may be relevant.

6 Now, since I haven't had much of an  
7 opportunity to speak to my panelists in advance, I'm  
8 going to look to them to help me out. I really think  
9 it would be helpful if we sort of started with really  
10 just a few minutes because we are now going to show how  
11 we can catch up on an agenda. And I'd still like to  
12 end on time.

13 So if you could give me a few minutes on how  
14 does your organization -- we'll skip over Fred for a  
15 moment. How does your organization use vendors and/or  
16 trusted sender programs, when did you start and why.  
17 Now, I understand that not all of you use in the same  
18 way, which is why I want to go down the line a little  
19 bit. So let's start that and then I'll ask Fred to  
20 give sort of an initial comment about his company's  
21 program and we'll go from there.

22 Ed.

23 MR. MCCOYD: I'm with the Association of  
24 American Publishers. We're the national trade  
25 association of the book publishing industry. Our

1 members directly hire in the case when they use  
2 commercial vendors to do their monitoring of the  
3 internet for infringement and sending of takedown  
4 notices. They have direct relationships with the  
5 vendors. So AAP, unlike some of the other trade  
6 associations, doesn't provide that as a service.

7           However, we do talk to our members about who  
8 they are using and recently we canvassed them as to how  
9 many had access to Google's trusted submitter program  
10 for its search platform. And it turned out that quite  
11 a few of them were getting access through a vendor that  
12 they use for notice and takedown called Digimarc. When  
13 Digimarc finds downloadable infringing files hosted on  
14 sites such as cyber lockers, it will send a takedown  
15 notice to the hosting site but will simultaneously use  
16 Google's trusted copyright removal program to send a  
17 request to Google to have links to those hosted  
18 infringements removed from Google search results. And  
19 their experiences with that have been very positive.  
20 They've spoken very favorably about it.

21           There's also another vendor called Mark  
22 Monitor which does the same thing for another one of  
23 our large publishing members.

24           And, finally, several publishers in our  
25 membership have access to a service called a copyright

1 infringement portal which is administered by the  
2 publisher's association in the UK and which our members  
3 have discounted access to pursuant to an arrangement  
4 we've entered with the UK publisher's association. And  
5 the portal also has access to TCRP and reports good  
6 things about it.

7           And finally, Covington and Burling law firm  
8 has a vending arm in its London office which does  
9 monitoring and takedown notification, and they have  
10 access to trusted sender programs at the online  
11 marketplaces Ebay and Taobao, for example. So not all  
12 of our member publishers have access through  
13 third-party vendors to trusted submitter programs. We  
14 did ask them whether they would be interested in  
15 broader access and they said they would.

16           And, furthermore, even the publishers that  
17 have such access through vendors don't -- some  
18 publishers use vendors pretty much exclusively for  
19 their monitoring and takedown. Some do everything  
20 in-house, particularly smaller and medium-sized  
21 publishers that don't have the resources to pay for  
22 such vendors. And then some do a combination. So, for  
23 example, the vendor will specialize in finding and  
24 doing takedown on downloadable files, but then the  
25 publisher's in-house team will handle things like the

1 entire book is posted in HTML on a web page or also  
2 linking sites which aggregate links to files hosted  
3 elsewhere.

4           So the members said yes, we would be  
5 interested in getting broader access to trusted  
6 submitter programs; however, AAP wouldn't be -- if AAP  
7 did have an opportunity to be a facilitator for more  
8 publishers to get access, we'd love to do that. But if  
9 it involves our office being an administrator of the  
10 day-to-day -- handling the day-to-day submission of the  
11 links and other data, we would need more resources to  
12 do so. So we would have to see whether the member  
13 publishers would be willing to pay additional fees to  
14 staff us to do that or for us to hire a third party to  
15 help us.

16           But if the administration is something that  
17 individual publishers, large and small, could handle,  
18 then we were thinking perhaps we could play a more  
19 limited facilitating role.

20           MS. BLANK: Thanks, Ed. Vicky.

21           MS. SHECKLER: Hi, I'm Vicky with Recording  
22 Industry Association of America. We represent the  
23 major record labels in the United States. We along  
24 with our sister trade associations do the bulk of the  
25 web-based noticing in house and don't necessarily use



1 outside vendors for that type of work. Occasionally  
2 we'll use outside vendors. We're continuously  
3 assessing the benefits of outside vendors, but today we  
4 do most of it in-house.

5 MR. KUPFERSCHMID: I'm Keith Kupferschmid, I'm  
6 with the Software and Information Industry Association.  
7 It's fairly easy I think when you hear the Motion  
8 Picture Association and the recording industry and the  
9 AAP, the book publishers, to sort of realize, okay, I  
10 get it, I know who they represent. For us, not so  
11 much.

12 We represent sort of what I would like to  
13 consider the serious side of copyright, not the  
14 entertainment side. And so we represent software  
15 companies and information companies. And as you  
16 might imagine, each of them -- I mean, I think we do  
17 have about 800 member companies. And they range from  
18 very large companies like an Oracle or IBM to very,  
19 very, very small companies.

20 And depending on the size of the company  
21 you're talking about, they may or may not have the  
22 resources to do it themselves. They may ask us for  
23 assistance. They may ask us to do everything. And so  
24 it really does range for us in terms of what we do and  
25 who we use and how we use different services depending

1 on, frankly, the size of the company and the resources  
2 that are available.

3 We do have large members that do similar I  
4 think to what you heard from Ed that do their own  
5 automated and manual searching. Even those large  
6 companies will use us on occasion or maybe regularly  
7 depending on the company to do very what I would called  
8 targeted investigations or targeted searches. They  
9 might rely on us, for instance, to do enforcement on  
10 Craigslist or Taobao or something specifically focused  
11 like that.

12 The -- I guess if I can bring up the F word  
13 for a second, fair use. We don't -- we handle clear  
14 cases of piracy where entire works are being taken down  
15 or being infringed. And if there are instances where  
16 maybe portions of a work -- this doesn't really happen  
17 in software but mostly for our content companies.  
18 Where portions of are work being used, that's something  
19 that they would handle themselves. So we're looking  
20 for just real clearcut egregious cases.

21 And as part of that, I mean, it shouldn't come  
22 as a surprise, we've used third-party vendors for at  
23 least 15 years now and I can name them all but we don't  
24 have the time because we've bounced around from vendor  
25 to vendor. We also use -- we engage in sort of these

1 trusted sender programs. I mean, we don't really  
2 define that, so I'll define it rather broadly in terms  
3 of sort of a special relationship that we have with the  
4 ISP that allows us to more efficiently send them  
5 notices and get material taken down.

6 The groups or the trusted sender programs our  
7 companies work with is Ebay, Google, Amazon, Craigslist  
8 and Taobao. We understand a benefit of those programs  
9 is the fact, of course, that there are enough bad  
10 apples out there, so if you establish this trusted  
11 sender program, you're hoping that, of course, you  
12 won't get those bad apples in the program. So we  
13 understand that benefit.

14 We truly believe that these type of trusted  
15 sender programs are the future, not just in DMCA  
16 takedowns, but we saw this issue come up in the  
17 Marrakesh treaty discussions recently, in the ICANN  
18 discussions that are going on with accreditation of  
19 privacy and proxy services. It's a way to distinguish  
20 sort of the good guys who are willing to swear on a  
21 stack of bibles that they're doing the right thing and  
22 they know how to identify infringement from the people  
23 who might be misusing the copyright law for those  
24 purposes.

25 MR. SHEFFNER: I'm Ben Sheffner with the

1 Motion Picture Association of America. We represent  
2 the six major motion picture studios here in the U.S.  
3 And it's interesting to hear the sort of different  
4 practices of different trade associations, and I think  
5 one thing to keep in mind is that the practices do  
6 indeed differ.

7 Our model is a bit closer to the AAP actually  
8 than the RIAA in that the MPAA does not itself or  
9 through vendors send large numbers of DMCA notices  
10 either under section 512© or (D). Our six studios  
11 all handle that individually. Mostly they use vendors,  
12 but some do quite a bit of in-house. So the MPAA is  
13 not directly sort of overseeing the large scale  
14 takedowns by our members.

15 In terms of trusted sender programs, we think  
16 they are a good thing. There are not a lot of them.  
17 Of the major sites here in the U.S. that I'm aware of  
18 that are actually employing these, Google and various  
19 of its platforms and then Ebay through its VeRO program.  
20 We think they're a good thing. We think they're very  
21 helpful for both notice senders and recipients and we'd  
22 like to see more of them.

23 Just to give people who may not be familiar  
24 with what these trusted sender programs are or sort of  
25 how they operate or how you sign up for one, I like to

1 use the analogy of the Pre program of TSA when you go  
2 through security at the airport. Essentially what you  
3 have to do is you fill out a big form and you give TSA  
4 all this information and they run you through these  
5 databases, make sure you're not a terrorist, make sure  
6 you don't have a history of hijacking airplanes. And  
7 then you go in for a very brief interview and they give  
8 you basically a number. And once you have that number,  
9 you're routed into the special line at security. And  
10 essentially some of the normal security measures like  
11 having take off your shoes and taking your laptop out  
12 of your bag, you don't have to do that anymore and you  
13 can basically go through a fast lane. In other words,  
14 they've sort of prechecked you out so that you can be  
15 processed more efficiently.

16           These trusted sender programs have a lot in  
17 common. They essentially check you out, make sure they  
18 know who you are, make sure that you're sort of a  
19 legitimate company that has a history of sending  
20 legitimate notices and then you may be able to bypass  
21 certain of the hurdles that are normal -- that sending  
22 notices normally entails, whether it's using Captchas  
23 or filling out various forms to sort of tell the notice  
24 recipient, the service provider who you are. And it  
25 can make the process a lot more efficient.

1           Another thing that these trusted sender  
2   programs can do is sort of facilitate  
3   machine-to-machine transactions which we think are  
4   really the future of notice sending and receiving.  
5   Things like the use of APIs, other sort of  
6   machine-to-machine communications, those obviously take  
7   a little bit of work to set up to be -- the machines  
8   need to be able to talk to each other. It's not  
9   something generally that somebody who does this one off  
10   can do. Again, the use of such technology we think  
11   greatly improves efficiency as often facilitated  
12   through these kinds of arrangements.

13           MS. BLANK: Thank you. And it is interesting  
14   to hear how different each organization is in its  
15   handling of sending notices whether it's on behalf of  
16   their members or not.

17           Fred, time for you. If you could help us  
18   understand how Google came to develop its system, which  
19   I understand is a very massive system, and maybe you  
20   can outline that for us also and where you think this  
21   process is going.

22           MR. VON LOHMANN: Sure. Happy to do so. I  
23   will say, for the record, I have never asked Ben to  
24   remove his shoes. Entirely not the case. But actually  
25   I think Ben did a great job describing the basic

1 concept of the trusted submitter programs, at least the  
2 ones that Google operates.

3 Today we have trusted submitter programs for  
4 search, for You Tube for Blogger and for Picasa, among  
5 our services. As has been mentioned, there are similar  
6 programs that other large online service providers have  
7 also created.

8 At Google this really started in 2010 when,  
9 you know, we were thinking how can we improve the  
10 efficiency of the process. And we were seeing that a  
11 lot of our resources were used attending to notices  
12 that were submitted by sometimes individuals, sometimes  
13 companies, vendors, who were not clear about the  
14 process who ended up filing incomplete notices, notices  
15 that were misdirected. That ended up taking a lot of  
16 our internal effort.

17 And it was our suspicion at the time that  
18 probably, you know, to use the old 80/20 rule, probably  
19 80 percent of the notices that we were getting were  
20 probably coming from 20 percent or fewer of the  
21 submitters. And for those that were sophisticated,  
22 reliable repeat players, that there must be something  
23 we could do to essentially facilitate their submission  
24 without getting them trapped in the queue behind some  
25 of the notices that were more prone to being incomplete

1 or otherwise invalid or erroneous.

2 So that was the intuition that started our  
3 effort. And, in fact, now four years later, we have  
4 actually seen that intuition more than confirmed.  
5 Today I actually was just checking with some of our  
6 folks. We have just under 100 individuals or 100  
7 entities, I guess I should say, that are part of the  
8 trusted submitter program for web search. And those  
9 hundred odd submitters submit well above -- well in  
10 excess of 95 percent of all the notices that we receive  
11 for search are from those hundred entities. So it was  
12 much more than 80/20. It turned out to be more like  
13 95/1.

14 And I think my -- the feedback that I received  
15 from rights holders and vendors that use the trusted  
16 submitter program has been generally quite positive.  
17 We at Google have been quite grateful in developing  
18 these programs we've worked with content owners in the  
19 development program when we launched the original  
20 trusted submitter program for web search back in 2011,  
21 we did so in cooperation with folks from the content  
22 communities. So that's been very helpful.

23 MS. BLANK: Let me interrupt you. I want to  
24 have a teaching moment. So what I'm hearing from you,  
25 though, is that there was a problem on both sides. The



1 notice senders couldn't get their notices in because  
2 they were getting trapped and then you guys were  
3 getting swamped. Now we have a solution that has  
4 benefited both sides.

5 MR. VON LOHMANN: I think that's absolutely  
6 right. Again, I can't speak for everyone but certainly  
7 for Google, the trusted submitter programs have been  
8 very helpful for the particular problems that we were  
9 facing on the services where we had the largest volume  
10 of notices.

11 MS. BLANK: Just out of curiosity, the 100  
12 participants, what kind of sizes do they run? Are they  
13 the very large companies or small companies?

14 MR. VON LOHMANN: I think it's -- it covers a  
15 pretty wide range. From our perspective, the two  
16 characteristics that we're looking for when we receive  
17 applications for the program are, number 1,  
18 reliability, a demonstrated track record of good  
19 quality notices. We make it very clear to members of  
20 the trusted submitter programs that this is aimed at  
21 clear copyright violations to really encourage the use  
22 of this channel for, as was mentioned earlier, clear  
23 examples of infringement rather than edge cases that  
24 probably do require a little more review. And volume  
25 as the other factor.

1           The existing -- we attempt to build our public  
2 tools as much as possible to allow easy submission of  
3 relatively low volumes of notices. So the sort of  
4 special features of the trusted submitter program  
5 really only make sense if you are going to be  
6 submitting in volumes that the default public web form  
7 is not going to be able to handle.

8           So that's sort of the criteria we use. And  
9 probably the most important thing, I mean, as you point  
10 out, it really is a win-win. And from our perspective,  
11 one of the great advantages to creating a trusted  
12 submitter program was to create an incentive for good  
13 behavior on the part of submitters.

14           And, in fact, while the vast majority of those  
15 who have chosen to participate in the trusted submitter  
16 program have been very good, have continued to be very  
17 reliable. There have been a few bad apples in that  
18 batch who sent repeated bad notices despite warnings,  
19 despite efforts to communicate with them, to explain,  
20 to try to work through what the issues were. And we  
21 have had to kick people out of the trusted submitter  
22 program.

23           And from our perspective it creates a very  
24 healthy set of incentives that keeps submission quality  
25 high. In fact, I've been thanked by some rights

1 holders insofar as it has kept the vendor community's  
2 quality higher. It keeps the vendors, the enforcement  
3 vendors, it keeps them on the ball which is something  
4 that both copyright owners and service providers both  
5 want. They want their vendors -- everyone wants the  
6 vendors to be doing a high quality job.

7 So, yeah, I think that has been, at least in  
8 our experience, it has been a win on both sides.

9 MS. BLANK: Vicki, you look like you want to  
10 ask a question.

11 MS. SHECKLER: I would like to comment. We do  
12 very much appreciate what Google has done with the  
13 trusted submitter program with search, but I'd like to  
14 put it in context for you. In roughly the past two  
15 years, which is when we have been doing this to scale,  
16 RIAA alone has sent Google roughly 58 million  
17 infringements to de-index in that time. And that's for  
18 roughly 300 sites, more or less. It could be like 350,  
19 something like that. That suggests that there's a  
20 problem with this system.

21 You may have heard last Friday the Taylor  
22 Swift 1989 album leaked. RIAA and its sister  
23 organizations have sent over 3000 infringement notices,  
24 about that, since Friday. I looked this morning, I  
25 easily found 22 links to that album from unauthorized

1 sources. So while the trusted submitter program is great  
2 and very much appreciated, we very much appreciate the  
3 new efforts that Google has undertaken to go with that  
4 program to help demote some pirate sites and that seems  
5 to be working well, we very much appreciate that, I'd  
6 like to remind us about the context that we're talking  
7 about here and that that is one of the reasons you hear  
8 us talk so much about efficacy as well as efficiency.

9 MR. VON LOHMANN: And, of course, this process  
10 that we -- that the PTO has convened here has been  
11 about the DMCA process and ways in which that process  
12 can be improved. And Google continues to receive as  
13 efficiently as possible and act on as expeditiously as  
14 we can the notices that we receive. We do not control  
15 the web. We cannot stop people all over the web from  
16 posting materials that they shouldn't post and we  
17 welcome working together with rights holders to  
18 identify and remove those from search results when we  
19 can. But the DMCA process clearly anticipates the  
20 submission of notices and the expeditious action on the  
21 part of service providers. And that is exactly what  
22 Google has consistently done and what the trusted  
23 submitter program is intended to make better.

24 MS. BLANK: Let me veer off in a slightly  
25 different direction for a moment. Keith, you said that

1 you use vendors to send out notices. Do you  
2 participate in any trusted submitter-type programs?

3 MR. KUPFERSCHMID: Sure, we do. We have  
4 various trusted submitter programs that we work with.  
5 You know, I mentioned before Ebay and Google. We also  
6 have our own sort of not trusted submitter program, but  
7 we've created a program somewhat similar that has had  
8 its benefits which is on -- that we use on Ebay which  
9 is to certify resellers, software resellers.

10 And really what these resellers do, we give  
11 them sort of a certification mark that they would put  
12 on that auction site and that helps them with their  
13 customers, the people who are going to look for  
14 software where they see the certification and they go  
15 okay, well, they've been certified by SIA. What that  
16 means is they're not selling pirated software, OEM or  
17 academic software.

18 And there's benefits to them for doing that,  
19 right. They can draw more traffic or more customers to  
20 their particular auction. And there's obviously  
21 benefits to us also because then we can hopefully  
22 somewhat, I think, what like, for instance, Google is  
23 doing and other trusted program do, sort of define,  
24 divide the good actors from the bad actors here. And  
25 that program that we run or have run does something I

1 think very similar.

2 So the benefits of trusted submitter or  
3 trusted sender program I think are significant and it  
4 would be good to see I think a lot more ISPs take that  
5 up; in other words, to improve the efficiency of the  
6 DMCA notice and takedown process because I think it  
7 benefits everyone. As Fred mentioned, he's found that  
8 it's a win-win, I think it is a win-win.

9 MS. BLANK: When you work with your vendors  
10 for sending notices, do you have some kind -- what's  
11 your method for making sure they remain good vendors  
12 and not run afoul, say, of trusted submitter criteria?

13 MR. KUPFERSCHMID: I think this is - While I'll  
14 just speak for myself, and throw it open to other people,  
15 in terms  
16 of the vendors that we use or don't use. What we do is  
17 we just do just like anyone we do business with, we  
18 investigate them first and, you know, through word of  
19 mouth and through other means and find out, you know,  
20 we're actually looking at one vendor right now that we  
21 thought pretty good things of and then I heard some  
22 things the other day that maybe called that into  
23 question.

24 And so it's just -- honestly it's just good  
25 business practices. I don't think it's anything

1 specific to vendors. Anyone you do business with, you  
2 want to make sure you're doing business with someone  
3 who's, you know, ethical in doing business in the right  
4 way, whatever that business is.

5 MS. SHECKLER: I would add to what Keith was  
6 saying that it's always good to do diligence on your  
7 vendors and to run a trial program as a sender we  
8 regularly run trials with our senders before sending any  
9 notices from any vendor so that we can assess the  
10 quality of them.

11 MR. SCHEFFNER: And I would raise another  
12 example. It's a little bit outside the scope of what  
13 we're talking about today, but I think it's highly  
14 relevant, which is about our enforcement of peer-to-  
15 peer. We the MPAA and the RIAA are involved in  
16 something called the copyright alert system which is a  
17 voluntary initiative we entered into with a number of  
18 the major ISPs here in the US to send notices to  
19 identify infringement going on with peer-to-peer  
20 networks, then have our vendors send notices to the ISPs  
21 who pass along what we refer to as copyright alerts to  
22 the individual users.

23 We have a vendor, MarkMonitor, which scans  
24 these peer-to-peer networks and then based -- it  
25 does -- it goes through the whole sort of verification

1 protocol and then they send along notices. No one  
2 calls this a trusted sender program, but that's  
3 essentially what it is. They -- you know, we and our  
4 vendor and ISPs who are the recipients of these notices  
5 have worked out the protocols. It's done through  
6 machine-to-machine communication using this protocol  
7 that we mentioned early on called ACNS, the Automated  
8 Copyright Notification System. And it essentially  
9 allows for -- facilitates the communication between --  
10 directly machine-to-machine between the vendor and the  
11 ISPs.

12 We think it's worked pretty well in terms of  
13 its sort of technical operation. ACNS was not designed  
14 just for peer-to-peer. We think it's easily adaptable  
15 to the 512© and potentially (D) context as well. And  
16 actually one thing that we would like to come out of this  
17 process is to sort of include a modified version of  
18 ACNS just to use as an example of the kind of scalable  
19 machine-to-machine communication that we think  
20 facilitates efficiency.

21 But I would echo a point that Vicki just made  
22 a few minutes ago and which I've made at previous of  
23 these meetings, which is efficiency is great, we should  
24 all be in favor of efficiency. Certainly no one is  
25 against that. But efficiency alone does not solve the



1 underlying problem. I mean, the fact that they've sent  
2 hundreds of millions of notices, we've sent tens of  
3 millions of notices -- our members have sent tens of  
4 millions of notices is in some ways a success story  
5 because, yes, there's these processes in place to  
6 process all of this stuff, all of these notices. But  
7 in another way it's a failure because it shows that  
8 there's massive amounts of infringement that isn't  
9 really solved by this process.

10 MR. VON LOHMANN: Turning to Jenny's original  
11 question, I think one very part of assisting in the  
12 diligence of vendors is the publication of transparency  
13 reports. And Google has a published a transparency  
14 report that allows any copyright owner to go and  
15 evaluate the record of any of the vendors who have sent  
16 us takedown notices. Every notice is documented in the  
17 transparency report. You can see what percentage of  
18 those URLs that were reported were rejected, how many  
19 of them were not rejected. And that, you know, and in  
20 my mind that gives you something more to go on in terms  
21 of diligence and monitoring the effectiveness of your  
22 vendors than simply their word or how they happen to be  
23 when you originally did a contract with them.

24 So, of course, in addition to the transparency  
25 report, when we do receive faulty notices from

1     submitters who are members of the trusted submitter  
2     program, we reach out and try to have a conversation  
3     and say something seems to have gone awry here, and  
4     often that allows the vendor or the rights holder in  
5     that case to fix the issue, which, of course, is the  
6     best outcome for everyone. So there's communication  
7     and transparency as well that's important.

8             MR. MCCOYD: If I could just add to some of  
9     the points just made. Publishers are not currently  
10    participating in the copyright alert system which was  
11    established by other industries, but we conducted some  
12    or we arranged for some pilots a while back for our  
13    members to use MarkMonitor as well as another vendor  
14    called Irdeto to take advantage of relationships that  
15    those vendors had established with telecoms to -- for  
16    the internet access providers to voluntarily forward  
17    notices to their subscribers who were detected engaging  
18    in infringement of the publisher's titles via  
19    peer-to-peer and some direct publisher-to-vendor  
20    relationships emerged out of that. And that was both  
21    for telecoms within the U.S. as well as those willing  
22    to collaborate, those abroad willing to collaborate  
23    with the vendors.

24             On the transparency piece, we are very  
25    supportive of collecting data as Fred just mentioned

1 and was also reported in the presentation given this  
2 morning. One issue that we've taken note of is on  
3 Chilling Effects, when the service provider forwards  
4 its notice, at least as far as we can see, the full  
5 links that were reported are included. So -- and I  
6 know Sandra has mentioned as part of the technical  
7 working group's discussions in the past, looking at  
8 transparency as a whole and seeing, for example, if  
9 automated measures can be implemented to redact a  
10 portion of the link because in some instances if you  
11 search for a popular book title, on the first page of  
12 results you will occasionally see a Chilling Effects, a  
13 link to a Chilling Effects page. And if the person is  
14 resourceful enough to click through and copy and past  
15 links in the notice, they will come across some  
16 infringements which are still live. So just a  
17 potential future piece of work that I'd like to posit.

18 MS. BLANK: Thank you. This time went very  
19 quickly. Somehow I thought it would feel like we had  
20 more time. But I want to thank everybody for being  
21 available today to talk about this issue. I think we  
22 have more to talk about and I think that it will come  
23 up naturally as our process continues. And at this  
24 point I would like to ask John Morris from NTIA to come  
25 and say some final remarks for us.

1 MR. MORRIS: Reclaim my identity.

2 Thanks, Jennifer. Really just a closing thank  
3 you. I mean, I think -- Shira and I thought that this  
4 was an extremely constructive meeting that -- I mean,  
5 obviously the work that -- Jim and Sandra have been  
6 leading the work that all of you have been doing, has  
7 made an enormous amount of progress. And then the  
8 participation both on the phone and in person with a  
9 lot of new ideas and new things for the stakeholder  
10 group to really grapple with were very, very helpful.  
11 And this panel I thought was also very helpful.

12 So really nothing more to add other than to  
13 encourage you to keep up the good work. Extend a  
14 specific thanks again to Jim and Sandra and thanks to  
15 all of you. I think we're done.

16 MS. BLANK: We're done.

17 MR. MORRIS: So we're done. Thank you very  
18 much for coming out and we'll see you December 5 --  
19 we'll see some of you December 15 or on the webcast.  
20 So thanks very much for coming.

21 MR. PETERS: What time?

22 MR. MORRIS: I have no idea. Sometime. It  
23 will start later than 7 a.m. and it will end before  
24 7 p.m., I'm sure of that. I have no idea. I don't  
25 know. Hopefully we'll be able to figure out that soon.

1 MS. BLANK: Well get that soon, definitely.

2 MR. MORRIS: Thank you very much.

3 (Proceeding concluded at 11:53 a.m.)

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## 1 CERTIFIED SHORTHAND REPORTER'S CERTIFICATE

2 STATE OF CALIFORNIA )

3 COUNTY OF CONTRA COSTA ) ss.

4

5 I, ANGELICA R. GUTIERREZ, hereby certify:

6 I am a duly qualified Certified Shorthand  
7 Reporter in the State of California, holder of  
8 Certificate Number CSR 132925 issued by the Court  
9 Reporter's Board of California and which is in full  
10 force and effect. (Civ. Proc. 2025.320 (a))

11 I am authorized to administer oaths or  
12 affirmations pursuant to California Code of Civil  
13 Procedure, Section 2093 (b) and prior to being examined,  
14 the witness was first placed under oath or affirmation by  
15 me. (Civ. Proc. 2025.320, 2025.540)

16 I am the officer that stenographically  
17 recorded the testimony in the foregoing proceedings and  
18 the foregoing transcript is a full true record of the  
19 testimony given. (Civ. Proc. 2025.540 (a))

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21 services or products to any party's attorney nor party  
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24 the deposition and making same available at the same time  
25 to all parties or their attorneys. (Civ. Proc.

1 2025.320(b) )

2 I shall not provide any service or product  
3 consisting of the deposition officer's notations or  
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5 or party present at the deposition to any attorney or  
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7 financing all or part of the action, nor shall I collect  
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